

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

FIRST APPEAL NO.434 OF 2007

New India Assurance Company Ltd
Through it's Divisional Managar
Adalat Road, Aurangabad.

... Appellant
(Orig. Resp. No.2)

Versus

1. Malanbai W/o. Devidas Thube
Age : 48 Years, Occ: Agri. and
Household, R/o. Pokhari,
Tq. Vaijapur, Dist. Aurangabad.

2. Rameshwar S/o. Murlidhar Gaikwad
Age : 47 Years, Occ: Business,
R/o. Babhulgaon (Br.)
Tq. Vaijapur, Dist. Aurangabad.

... Respondents

(Resp. No.1 Orig.
Claimants & Resp.
No.2 Orig. Resp.
No.1)

...

Mr.S.G. Chapalgaonkar, Advocate a/w Mr.S.S. Dargad,
Advocate for the Appellant.
Ms.Mangal Manal, Advocate for Respondent No.1

...

**CORAM : V.L. ACHLIYA, J.
DATED : 17th JANUARY, 2020**

JUDGMENT:-

. Being aggrieved and dissatisfied by the judgment and award passed by Motor Accident Claims Tribunal in Motor Accident Claim Petition No.131/2004 dated 21.12.2006, the appellant (original respondent no.2) has preferred this appeal.

2. Heard the learned counsel for the appellant and the counsel representing the respondent no.1. Respondent No.2 though served, absent. Perused the Record and Proceedings.

3. For the sake of brevity and convenience, it would be useful to refer the parties as they are referred in Claim Petition.

4. In brief, the facts leading to filing of appeal are as under:

a. The respondent no.1 – original claimant filed application seeking compensation of Rs.1,00,000/- on account of injury sustained by her in an accident occurred on 3rd July, 2001. She approached with the case that on 3rd July, 2001, she was travelling in a vehicle bearing registration number MH-20-A-5991 (hereinafter referred as to the 'said vehicle') along with other villagers as the pilgrims from *Pandharpur* to her village after visiting Vitthal-Rukhmini temple at Pandharpur. At about 3.00 a.m. when said vehicle crossing the *Shivnha* river bridge, near village Zolengaon, Tq. Vaijapur, Dist. Aurangabad, the driver lost control over the vehicle and the vehicle fell down in the river. In the accident, the claimant and other

passengers travelling in the said vehicle sustained grievous injuries. On account of incident, the offence came to be registered against the driver of the said vehicle. Due to the injury sustained in the accident, the claimant claimed compensation of Rs.1,00,000/- towards pecuniary and non-pecuniary damages.

b. The Respondent no.1-owner of the vehicle though served failed to appear. The case proceeded ex-parte against respondent no.1. The appellant-respondent no.2 appeared and resisted the claim petition with contention that the vehicle involved in the accident being goods carriage vehicle, the carriage of passengers was not permissible. At the time of incident, 37 passengers were travelling in the goods vehicle i.e. truck as the passengers. By allowing the carriage of passengers in goods carriage vehicle, the respondent no.1-insurer has committed breach of policy condition. It is further claimed that the risk of the passengers travelling in the said vehicle was not covered under the terms of policy. In contravention of the terms and conditions of permit the vehicle was used for carrying the pilgrims from the village to Pandharpur and while returning from Pandharpur the vehicle meet with accident resulting injuries to

passengers in vehicle. By allowing the use of vehicle for carriage of passengers, the owner-insured has committed fundamental breach of condition of policy. So also the driver of the said vehicle was not holding requisite licence to drive the said vehicle involved in the accident. The driver was holding licence to drive only light motor vehicle (non transport). The vehicle involved in the accident being heavy goods vehicle (HGV), the driver ought to have licence to drive heavy goods vehicle (transport). Having allowed the vehicle to be driven by the person not holding requisite driving licence to drive the vehicle, the respondent no.1-insured committed breach of policy condition. Beside the breach of policy condition, the appellant-insurance company denied its liability to pay compensation on the ground that the risk of the passengers travelling in said vehicle not covered under the terms of policy. The appellant-insurance company denied its liability to pay the compensation and prayed for dismissal of claim petition.

5. On due consideration of rival pleadings, oral and documentary evidence adduced in the case, the Tribunal has partly allowed the claim petition. The Tribunal has ordered the Respondent Nos.1 and 2 jointly and

severally to pay the compensation of Rs.25,000/- (inclusive of NFL) with interest @ 7.5% p.a. from the date of petition till its realization. Being aggrieved by the order passed by the Tribunal, the respondent no.2-insurance company has preferred this appeal.

6. The learned counsel for the appellant assailed the impugned judgment and order passed by the Tribunal with contention that in view of the conclusion and the findings recorded by the Tribunal, that the appellant-insurance company is not liable to pay compensation to the claimant, on account of vehicle being goods carriage vehicle and the compensation to be payable only by owner of the offending vehicle, the Tribunal should not have passed the order to make the appellant (orig. respondent no.2) to pay the amount of compensation jointly and severally along with respondent no.1. It is submitted that the order passed by Tribunal is contrary to reasons findings recorded in judgment and order passed in the matter. In the connected claim petition No.122/2004 decided by Tribunal vide judgment and order dated 11.08.2006, the Tribunal passed order to pay and recover the amount from insurance company.

7. On the other hand, the learned counsel for the respondent no.1 support the judgment and award passed by the Tribunal. It is submitted that even if it is accepted that there was a breach of policy conditions on the part of the owner of the vehicle, the appellant-insurance company is required to satisfy the award and recover the amount from respondent no.1 i.e. owner/insured. In support of the submission advanced, the learned counsel has referred and relied upon the decision of the Hon'ble Apex Court in the case of **Anu Bhanvara etc. Vs. Iffco Tokio General Insurance Company Limited and Others** reported in **(2019) 10 SCALE 668**.

8. I have carefully considered the submissions advanced in the light of overall facts of the case, the rival pleadings, oral and documentary evidence adduced as well as the reasons and findings recorded by the Tribunal. In my view, the judgment and award passed by the Tribunal deserve to be modified. It is apparent from the face of the judgment and award passed by the Tribunal that the operative order passed in the matter is not in consonance with the reasons and findings recorded in the judgment. While dealing with the contention of the appellant-insurance company that the insurance company is not liable to pay compensation,

the Tribunal has observed that order of pay and recover to be passed in the matter. It is also observed that the respondent no.2-insurance company deserves to be directed to pay the amount and to recover the same from the respondent no.1 i.e. owner of the vehicle involved in the accident. In para 9 and 10, the Tribunal has observed as under:

"9. It has been proved that the accident took place and the vehicle involved in the accident is goods carrier vehicle. In the case reported in New India Assurance Co. Ltd. Vs. Sunita Nandkishore Borkar reported in 2006 (2) T.A.C. 204(Bombay) wherein His Lordship held that, " Whether insurance Company even though not liable to pay compensation can be directed to satisfy the award in favour of the claimants and then recovery the same from owner of the vehicle"

10. To sum up the case, I come to the conclusion that claimant has partly proved her claim, but as per the above citation while direction the respondent is directed to pay the amount first and then it can recover from the owner of the goods vehicle."

9. However, the final order passed in the matter is not in tune with the findings and conclusion drawn by the Tribunal to pass the order of pay and recover. The operative order passed in the matter reads as under:

"ORDER

(1) Application is partly allowed.

(2) The respondent nos. 1 and 2 shall jointly and severally do pay Rs.25,000/- (Rs. twenty five thousand only) including the

N.F.L. amount to the claimant with interest @7.5% p.a. from the date of petition till its full realization and the proportionate costs of this petition, costs of the petition and interest.

(3) The award be drawn up accordingly."

10. Thus, in view of the patent illegality committed on the part of Tribunal in passing the order, the appeal deserves to be partly allowed so as to modify the order to direct the appellant-insurance company to pay the amount and recover the same from respondent no.1 i.e. owner of the vehicle involved in the accident.

11. The contentions raised by the learned counsel for the appellant that the appellant-insurance company cannot be held liable to pay the compensation by applying the principle of 'pay and recover' cannot be accepted. The principle of 'pay and recover' is duly recognised under the law. In the case of ***Shamanna And ors. Vs Divisional Manager, Oriental Insurance Company Ltd.*** reported in ***(2018) 9 SCC 650***, in para 13 the Hon'ble Supreme Court has observed as under:

"13. 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."

9. Similarly, in the case of **Anu Bhanvara etc.** (supra), the Apex Court has upheld the principle of pay and recover. In para 11 of the said judgment, the Hon'ble Apex Court has observed as under:

"11. We have heard learned counsel for the parties and perused the record as well as the various decisions cited by learned counsel for the parties. The insurance of the vehicle, though as a goods vehicle, is not disputed by the parties. The claimants in the present case are young children who have suffered permanent disability on account of the injuries sustained in the accident. Thus, keeping in view the peculiar facts and circumstances of this case, we are of the considered view that the principle of "pay and recover" should be directed to be invoked in the present case."

10. Thus, in the light of overall facts of the case and the principle of 'pay and recover' hold the field and operate as binding precedent, the appeal deserves to be partly allowed and the award passed by

the Tribunal required to be suitably modified so as to enable the appellant-insurance company to pay the amount and recover the same from respondent no.1-owner/insured of the vehicle on account of breach of policy condition.

11. As against the claim of Rs.1,00,000/-, the Tribunal has awarded the compensation of Rs.25,000/- inclusive of no fault liability. The accident has taken place in the year 2000. The claim petition was decided in the year 2006. The appeal was preferred in the year 2007. In view of the quantum of compensation awarded and period of more than 20 years has lapsed, it is not desirable to consider, whether the peculiar facts and circumstances of the case exists or not to pass the order of 'pay and recover'. For this reason also, the judgment and award passed by the tribunal making the insurance company to pay the amount and recover the same from respondent no.1 i.e. owner/insured deserves no consideration on merit.

12. In the result, the appeal deserves to be partly allowed to the limited extent to direct the appellant (respondent no.2) i.e. insurance company to pay the amount in terms of the award and recover the same from respondent no.1 i.e. owner/insured of the vehicle

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involved in the accident by filing execution petition.
Hence, the following order:

ORDER

(i) The appeal is partly allowed with no order as to costs.

(ii) The respondent no.2-insurance company is directed to pay the amount in terms of judgment and award dated 21.12.2006 passed in Motor Accident Claim Petition No.131/2004 by Motor Accident Claims Tribunal, Aurangabad and recover the same from the owner/insured of the vehicle i.e. respondent no.1.

(iii) Decree be drawn accordingly.

13. In view of disposal of appeal, no cause survives to prosecute the civil applications. The civil applications be marked as disposed of.

(V.L. ACHLIYA)
JUDGE

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