

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

**FIRST APPEAL NO. 1135 OF 2007
WITH
CIVIL APPLICATION NO.8112/2007**

M/s. New India Assurance Co. Ltd.,
having its Regd. and Head Office at
New India Assurance Building, 87
M.G. Road Fort, Mumbai 411001,
Br. Beed, Huttma Smruti Mandir Complex,
Park Chowk, Solapur Dist. Solapur
Divisional Office at Adalat Road,
Aurangabad through its
Dy.Manager & Constituted Attorney
Mr.Suhas Purshottam Puranik.

.. APPELLANT
(Org. res.no.4)

VERSUS

1. Madhuri w/o Gajanan Sawant,
Age : 22 years, Occu.: Nil,
(Appeal dismissed against her as per order dated 18.06.2004)
2. Shreyas Gajanan Sawant,
Age : 16 years,
(R/2 minor u/g of No.1 Above)
R/o.: Bhosale Galli, Tuljapur.
Tq. Tuljapur District Osmanabad
(Nos.1 & 2 – org.claimant
nos.1 & 2)
3. Manikrao Yeshwantrao Pawar,
Age : Adult, Occu.: Business,
R/o.Bhawani Road, Tuljapur,
Tal. Tuljapur, Dist. Osmanabad,
Died, through his L.Rs. -
 - 3-1) Vikram Manik Pawar,
Age : 48 years, Occu.: Agri,
 - 3-2) Sunil Manik Pawar,
Age : 42 years, Occu.: Agri,

Both r/o. Bhavani Road, Tuljapur,
Dist. Osmanabad.

4. The Oriental Insurance Co. Ltd.
Pashim Mangalwar Peth, Chate Galli,
Solapur Dist. Solapur.
 5. Milind Abaji Patil,
Age : Adult, Occu.: Business
R/o. Vijapur Road, Solapur, Dist. Solapur.
- .. RESPONDENTS**

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Advocate for Appellant : Shri V. N. Upadhye
Dismissed against respondent no.1 vide Court order dated 18.6.2014.
Advocate for Respondent nos.2 : Shri V.A. Bagal
Advocate for Respondent nos.4 : Shri S.M. Ganachari
Respondent no.5 served.

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**FIRST APPEAL NO. 1136 OF 2007
WITH
CIVIL APPLICATION NO.8113/2007**

M/s. New India Assurance Co. Ltd.,
having its Regd. and Head Office at
New India Assurance Building, 87
M.G. Road Fort, Mumbai 411001,
Br. Beed, Huttma Smruti Mandir Complex,
Park Chowk, Solapur Dist. Solapur
Divisional Office at Adalat Road,
Aurangabad through it's
Dy.Manager & Constituted Attorney
Mr.Suhas Purshottam Puranik.

.. APPELLANT
(Org. res.no.4)

VERSUS

1. Vasantrao s/o Gangaram Bhosale,
Age : 75 years, Occu.: Nil,
2. Vatsalabai Vasantrao Bhosale,
Age : 70 years, Occu.: Household work
3. Vanmala Balasaheb Bhosale,
Age : 34 years, Occu.: Household work
4. Ashawini Balasaheb Bhosale,
Age : 16 years, Occu.: Education
5. Abhijit Balasaheb Bhosale,
Age : 15 years, Occu. Education

(Nos. 4 and 5 Minors u/g of No.3 above)

All R/o.: Bhosale Galli, Tuljapur
Tq. Tuljapur District Osmanabad.

(Nos.1 to 5 – org.claimants)

6. Manikrao Yeshwantrao Pawar,
Age : Adult, Occu.: Business,
R/o.Bhavani Road, Tuljapur,
Tal. Tuljapur, Dist. Osmanabad
Died, through his L.Rs. -

6-1) Vikram Manik Pawar,
Age : 48 years, Occu.: Agri,

6-2) Sunil Manik Pawar,
Age : 42 years, Occu.: Agri,
Both r/o. Bhoom Road, Tuljapur,
Dist. Osmanabad

7. The Oriental Insurance Co. Ltd.
Pashim Mangalwar Peth, Chate Galli,
Solapur Dist. Solapur.

8. Milind Abaji Patil,
Age : Adult, Occu.: Business
R/o. Vijapur Road, Solapur, Dist. Solapur.

.. RESPONDENTS

(Nos.6 to 8 org.res.nos.1 to 3)

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Advocate for Appellant : Shri V. N. Upadhye

Appeal dismissed against respondent no.1 vide Court order dated 18.6.2014.

Advocate for Respondent nos.3, 4 & 5 : Shri V.A. Bagal

Advocate for Respondent nos.7 : Shri S.M. Ganachari

Respondent no.8 served.

CORAM: V.L. ACHLIYA, J.

DATE: 27.02.2020

JUDGMENT :

1] Since the challenge raised in the appeals arises out of common judgment and award dated 6.7.2007 passed by Motor Accident Claims Tribunal, Osmanabad, in Motor Accident Claim Petition Nos.191/2003 and 192/2003, the appeals are heard together and decided by common judgment and order.

2] Heard learned counsel for the appellant and respondent nos.3,4, 5 & 7. Perused the record and proceedings.

3] In view of the challenge raised in the appeals restricted to order of 'pay and recover' passed by the Tribunal, it is not required to deal with the facts of the case in detail. On account of accidental death of Balasaheb Vasantrao Bhosale and Gajanan Sawant, aforesaid two claim petitions came to be filed by their respective legal representatives. The claimants have approached with a case that at the time of accident, the deceased were traveling in Tempo Trax bearing registration No.MH-25/A-1272. They were proceeding from Tuljapur to Parbhani. At the relevant time of accident, said Tempo Trax was driven by respondent no.1 and owned by respondent no.2. According to claimants, when the Tempo Trax was passing from Tuljapur - Latur road and reached near Karajkheda Bus Stop, the Truck bearing registration No.MH-13/B-0581 (hereinafter referred as offending vehicle) gave violent dash to Tempo Trax, which resulted into accidental death of said two

persons traveling in Tempo Trax. The claimants have claimed that the accident had solely occurred due to rash and negligent driving on the part of driver of the Truck, which was owned by respondent no.3 and insured with respondent no.4. On account of accidental death, the claimants in MACP No.191/2003 claimed compensation of Rs.11,00,000/- and claimants in MACP No.192/2003 claimed compensation of Rs.7,00,000/-.

4] The respondent no.1 resisted the claim petitions with contention that the accident occurred solely due to negligence on the part of driver of the Truck i.e. respondent no.3. The respondent no.2 adopted the written statement filed by the respondent no.1. The respondent no.3, though served, failed to appear and contest the claim petitions. The appellant - insurance company (respondent no.4) resisted the claim petitions with contention that on account of breach of policy condition, the respondent no.4 - insurance company is not liable to pay compensation. It is claimed that at the time of accident, the driver of the offending vehicle was not holding the requisite driving license to drive the vehicle and thereby the respondent no.3 - insured had committed breach of policy condition.

5] On due consideration of the rival pleadings and evidence on record, the Tribunal has reached to the conclusion that the

drivers of both the vehicles were negligent in driving the vehicles and contributed for the cause of accident. The negligence of the drivers of the vehicles was apportioned in the ratio of 30 : 70. The driver of the Tempo Trax was held to be negligent and responsible for the accident to the extent of 30% in causing the accident. Whereas driver of the Truck was held to be negligent in driving the vehicle to the extent of 70%. The Tribunal has held that the Tempo Trax in question was not insured at the relevant time of accident. The Tribunal has accepted the defence of the respondent no.4 - insurance company to the extent that the driver of the Truck was not holding valid and effective license to drive the vehicle at the relevant time of accident. It is held that at the time of accident, the license which was held by the driver of the Truck was not renewed. The accident occurred on 12.6.2003. The license which was possessed by the driver of the Truck was renewed from 13.2.1999 to 12.2.2002 and from 26.6.2003 to 25.6.2003. Thus, it is held that at the relevant date and time of accident, the license was not renewed and in that view, the driver of the Truck was not holding valid and effective license to drive the vehicle. In MACP No.191/2003, the Tribunal has passed the award and directed the respondent no.1 to pay compensation of Rs.2,52,900/- to claimants and further directed the respondent no.3 to pay compensation of Rs.5,90,000/- to

claimants, inclusive of no fault liability, with future interest at the rate of 7.5% p.a. from the date of application till the date of realization of the amount. In MACP No.192/2003, the Tribunal has directed the respondent no.1 3 to pay compensation of Rs.1,06,500/- to claimants and further directed the respondent no.3 to pay compensation of Rs.2,48,500/- to claimants, inclusive of no fault liability, with future interest at the rate of 7.5.% p.a. from the date of application till the date of realization of the amount. The Tribunal has directed that the amount payable by the respondent no.3 shall be initially paid by the respondent no.4 - insurance company to claimants and thereafter same be recovered by the respondent no.4 from the respondent no.3. Being aggrieved by the order of 'pay and recover' passed by the Tribunal, the appellant - respondent no.4 - insurance company has preferred these appeals.

6] Learned counsel for the appellant assailed the impugned judgments and awards passed by the Tribunal with contention that the order to pay and recover passed by the Tribunal against the appellant - insurance company is not legally sustainable in law. It is submitted that in view of the conclusion to which the Tribunal has reached that there was breach of policy condition on the part of the respondent no.3 - insured, no such order of 'pay and recover' should have passed by the Tribunal. It is submitted that it has been

amply proved by the respondent no.4 – appellant that on the relevant date and time of accident, the driver of the insured vehicle was not holding valid and effective license. The license was renewed subsequent to accident. The Tribunal has wrongly placed reliance on the decision of the Apex Court in the case of *National Insurance Co. Ltd. v. Kusum Rai & others* reported at **2006 TAC (2), page 1**. By referring the decision, the learned counsel submits that the Apex Court has clearly observed in the judgment that the Court has passed the order of ‘pay and recover’ in exercise of its extraordinary jurisdiction vested in it under Article 136 of the Constitution of India. The decision in said case should not have been treated as binding precedent. It is submitted that in absence of such powers vested with the Tribunal, the order to pay and recover should not have been passed by the Tribunal and in that view, the judgment and award passed by the Tribunal deserves to be set aside.

7] On the other hand, learned counsel for the respondent – claimants supported the judgment and award passed by the Tribunal to pay and recover the amount. By referring the overall facts of the case, learned counsel submits that there was no fundamental breach of policy condition so as to exonerate the insurance company from payment of compensation. Learned

counsel for the respondents - claimants has relied upon the decisions of the Apex Court in the cases of *National Insurance Co. Ltd. v. Swaran Singh & others* reported at **(2004) 3 SCC 297** and *Shamanna & another v. Divisional Manager, Oriental Insurance Company Limited & others* reported at **(2018) 9 SCC 650** to support the judgment and order passed by the Tribunal.

8] I have carefully considered the submissions advanced in the light of overall facts of the case and the reasons and findings recorded by the Tribunal. The contention of learned counsel for the appellant deserves to be accepted to the extent that the Tribunal has erred in relying upon decision of the Apex Court in the case of *National Insurance Co. Ltd. v. Kusum Rai & others* reported at **2006 TAC (2), page 1**. It is apparent from the observations made in paragraph no.18 that the Apex Court has passed the order to pay and recover the amount in exercise of its extraordinary jurisdiction vested in it under Article 136 of the Constitution of India. The Apex Court has noted in paragraph no.18 as under:-

“18. Although, thus, we are of the opinion that the Appellant was not liable to pay the claimed amount as the driver was not possessing a valid license and the High Court was in error in holding otherwise, we decline to interfere with the impugned award, in the peculiar facts and circumstances of the case, in exercise of our jurisdiction under Article 136 of the Constitution of India

but we direct that the Appellant may recover the amount from the owner in the same manner as was directed in *Nanjappan* (supra)."

9] Now the next question posed for consideration in view of the finding reached by this Court that the Tribunal has erred in placing reliance upon the decision in the case of *National Insurance Co. Ltd. v. Kusum Rai & others* reported at **2006 TAC (2), page 1**, the order passed by the Tribunal to pay and recover the amount deserves to be set aside. Learned counsel for the respondent – claimants have placed reliance upon decision in the case of *National Insurance Co. Ltd. v. Swaran Singh & others* reported at **(2004) 3 SCC 297** wherein the Apex Court has considered the doctrine of 'pay and recover' to be applied by the Tribunal. It is held that even if insurance company proves that there was breach of policy condition on the part of insured regarding holding of valid driving license by the driver, still the insurance company cannot avoid its liability towards the insured unless such breach or breaches of the condition of driving license is / are found to be so fundamental or contributed to the cause of accident. It is further held that on adjudication of the claim if the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in terms of Section 149(2) read with Sub-section (7), still the Tribunal

can direct that the insurer is liable to be reimbursed by the insured.

In paragraph no.110, the Court has observed as under:-

“The summary of our findings to the various issues as raised in these petitions are as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 *inter alia* in terms of Section 149(2)(a) (ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to

drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving license produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's license, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims *inter se* between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes *inter se* between insurer and the insured. The decision rendered on the claims and disputes *inter se* between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued

by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims *inter se* might delay the adjudication of the claims of the victims.”

10] Thus, if we consider the facts of the case in hand, then there is no dispute that the deceased were third party to the extent of offending vehicle insured with the appellant – insurance company against whom order to pay and recover has been passed. It has been noted by the Tribunal that the driver of the offending vehicle was holding requisite qualification to drive offending vehicle. He was holding driving license to drive heavy motor vehicle since the year 1996. The accident occurred on 12.6.2003. From the year

1996, the license was renewed from time to time. The driver of the offending vehicle acquired the driving license to drive heavy motor vehicle on 14.2.1996 and same was valid upto 13.2.1999. Subsequently, it was renewed from 13.2.1999 to 12.2.2002. Thereafter, the license was renewed from 26.6.2003 to 25.6.2006 i.e. few days after the accident. The accident occurred on 12.6.2003. In the light of evidence on record, it can be safely inferred that the driver of the Truck had longstanding experience to drive heavy motor vehicle. Except for a short period covering the date of accident, the license was not renewed. In that view, it cannot be stated that the driver of the Truck was novice and not holding requisite eligibility criteria to drive the offending vehicle. Therefore, the cause of accident cannot be co-related as an act contributed for the cause of accident. In that view, the breach of policy condition cannot be termed as fundamental breach of policy condition to prevent the Tribunal not to pass the order of 'pay and recover'. Thus, in the light of decision in the case of *National Insurance Co. Ltd. v. Swaran Singh & others* reported at **(2004) 3 SCC 297**, which still holds the field, the judgments and awards passed by the Tribunal deserve no interference in exercise of appellate jurisdiction. In the recent decision by the Apex Court in the case of *Shamanna & another v. Divisional Manager, Oriental*

Insurance Company Limited & others reported at **(2018) 9 SCC 650**, the Apex Court has observed that decision in the case of *National Insurance Co. Ltd. v. Swaran Singh & others* (supra) still holds the field and the Tribunals are bound by the decision in the said case. In paragraph nos.13, 14 and 15, the 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 Nrain 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.

14. So far as the recovery of the amount from the owner of the vehicle, the insurance company shall recover as

held in the decision in *Oriental Insurance Co. Ltd. v. Nanjappan and others* **(2004) 13 SCC 224** wherein this Court held that :

“8. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.”

15. In the result, the impugned judgment of the High Court insofar as enhancement of the compensation to Rs.4,94,700/- is affirmed. Insofar as direction of the impugned judgment directing the appellants/claimants to recover the compensation from the owner of the vehicle is set aside and the appeal is partly allowed. The first respondent insurance company shall pay the enhanced compensation to the appellants/claimants along with the accrued interest and the insurance company shall recover the same from the owner of the vehicle. No costs.”

11] Thus, in view of above, the judgments and awards passed by the Tribunal against the appellant deserves to be upheld. In that view, the appeals preferred by the appellant - insurance company deserve to be dismissed. Accordingly, the appeals are dismissed with no order as to costs.

12] The appeals are disposed of in above terms. Civil applications, if any pending, shall stand disposed of in terms of order passed in the appeals.

(V.L. ACHLIYA, J.)