

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

FIRST APPEAL NO. 424 OF 2005

The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

**..APPELLANT
(Ori. Resp.No.2)**

VERSUS

1. Manohar S/o Arjunrao Shinde
Age : 20 years, Occu. Education,
R/o Sahayog Nagar, Nanded.
2. Gangadharrao S/o M. Gurjur,
Age : Major, Occu. Business,
R/o C/o. Gurjur Sports,
Shivajinagar, Nanded.

**..RESPONDENTS
(Resp. No.1 Orig.
Petitioner
Resp. No.2 Orig.
Resp. No.1)**

WITH

FIRST APPEAL NO. 425 OF 2005

The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

**..APPELLANT
(Ori. Resp.No.2)**

VERSUS

1. Vaijinath S/o Bhimrao Choudhary
Age : 25 years, Occu. Education,
R/o Jangamwadi, Nanded.

2. Gangadharrao S/o M. Gurjur,
Age : Major, Occu. Business,
R/o C/o. Gurjur Sports,
Shivajinagar, Nanded.

..RESPONDENTS

(Resp. No.1 Orig.
Petitioner
Resp. No.2 Orig.
Resp. No.1)

WITH**FIRST APPEAL NO. 565 OF 2005**

The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

..APPELLANT**(Ori. Resp.No.2)****VERSUS**

1. Kailas S/o Tukaram Wadikar,
Age : 27 years, Occu. Education,
R/o Jangamwaadi, Nanded.
2. Gangadharrao S/o M. Gurjur,
Age : Major, Occu. Business,
R/o C/o. Gurjur Sports,
Shivajinagar, Nanded.

..RESPONDENTS

(Resp. No.1 Orig.
Petitioner
Resp. No.2 Orig.
Resp. No.1)

WITH**FIRST APPEAL NO. 566 OF 2005**

The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

..APPELLANT**(Ori. Resp.No.2)**

VERSUS

1. Maroti S/o Shankarrao Shinganwad
Age : 22 years, Occu. Education,
R/o Jangamwadi, Nanded.
2. Gangadharrao S/o M. Gurjur,
Age : Major, Occu. Business,
R/o C/o. Gurjur Sports,
Shivajinagar, Nanded.

..RESPONDENTS

(Resp. No.1 Orig.
Petitioner
Resp. No.2 Orig.
Resp. No.1)

WITH**FIRST APPEAL NO. 567 OF 2005**

The Oriental Insurance Company
Limited, through its Branch
Manager, Branch at G.G. Road,
Nanded.

..APPELLANT

(Ori. Resp.No.2)

VERSUS

1. Umesh S/o Mllikarjun Bomnale
Age : 20 years, Occu. Education,
R/o Jaangamwadi, Nanded.
2. Gangadharrao S/o M. Gurjur,
Age : Major, Occu. Business,
R/o C/o. Gurjur Sports,
Shivajinagar, Nanded.

..RESPONDENTS

(Resp. No.1 Orig.
Petitioner
Resp. No.2 Orig.
Resp. No.1)

Mr. Jayant Chitnis, Advocate for the appellant in all First Appeals.

Ms. A.N. Ansari, Advocate for Respondent No.1 in FA/567/2005.

Mrs. C.S. Deshmukh, Advocate for Respondent No.2 in all First Appeals.

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CORAM: V.L. ACHLIYA, J.

DATED : 23.01.2020

JUDGMENT:

. All these group of appeals are preferred by the appellant-insurance company (original respondent no.2) challenging the judgment and award date 06.02.2003 passed by learned Joint District Judge and Ex-Officio Member of Motor Accident Claims Tribunal, Nanded.

2. Heard the learned counsel for the appellant-insurance company and the counsel representing respective respondents. Perused the Record and Proceedings.

3. For the sake of brevity and convenience the parties to appeals are

referred as they are described in claim Petitions.

4. In view of the challenge raised in appeals confines to pay and recover order passed by the Tribunal against the appellant – insurance company, it is not necessary to discuss the facts of the case and other aspects of matter in detail.

5. The respondent no.1 – original claimants in respective appeals had file Petitions under section 166 of the Motor Vehicle Act seeking compensation on account of accidental injuries sustained by them in an accident occurred on 02.05.1999. They have claimed that at the time of accident, they were travelling by Tata Sumo Jeep bearing registration No.MH-26-C-4432 from Nilanga towards Nanded. At about 11.00 a.m., the driver of said Tata Sumo Jeep lost control

over the vehicle and gave dash to the Stationary Truck, which resulted into causing multiple injuries and permanent disability to the claimants.

6. The particulars of the claims made and amount awarded by Tribunal summarized as under:-

Sr. No.	First Appeal Number	M.A.C.P. Numbers	Amount of compensation claimed	Amount of compensation awarded by the Tribunal
1.	424/2005	491/1999	Rs.1,00,000/-	Rs.27,500/- inclusive of N.F.L.
2.	425/2005	493/1999	Rs.50,000/-	Rs.5,000/- inclusive of N.F.L.
3.	565/2005	489/1999	Rs.2,00,000/-	Rs.1,15,000/- inclusive of N.F.L.
4.	566/2005	490/1999	Rs.1,00,000/-	Rs.37,500/- inclusive of N.F.L.
5.	567/2005	492/1999	Rs.1,00,000/-	Rs.25,000/- inclusive of N.F.L.

7. The respondent No.2 (original respondent no.1) in respective Claim

Petitions resisted the claim petitions with contention that the Petitions filed are bad-in-law for non-joinder of necessary parties to respective petitions. It is contended that the owner, driver of the truck involved in the accident are necessary parties to petitions filed by claimants. According to respondent no.1 – owner of Jeep the accident solely occurred due to negligence on the part of driver of the truck. Respondent no.1 has denied the case of claimants that accident was caused due to rash and negligent driving and absolute fault on the part of driver of Jeep owned by him.

8. The appellant – insurance company (original respondent no.2) has resisted the Claim petitions with contention that the owner of Jeep has committed breach of policy condition and thereby the insurance company not liable to pay the compensation. It is

contended that the driver of Jeep was not holding valid and effective driving licence to drive the Jeep in question. By entrusting the vehicle to a person having no valid and effective licence to drive the insured vehicle, the respondent no.1 i.e. the owner has committed breach of policy condition.

9. The Tribunal on due appreciation of the pleadings and evidence adduced in the case pleased to pass award making the respondent nos.1 and 2 jointly and severally liable to pay the compensation and granted liberty to appellant – respondent no.2 to recover the amount from the insured i.e. respondent no.1. Being aggrieved, the appellant – insurance company has preferred these appeals.

10. Learned counsel for the appellant – insurance company (respondent No.2) assailed

the impugned judgment and award passed by the Tribunal with contention that in view of fundamental breach of policy condition committed on the part of insured – respondent no.1, the Tribunal should not have passed the order of pay and recover. It is submitted that it has duly proved that the vehicle in question insured was registered for private use. The owner-insured has not obtained any permit to use the same for carriage of passengers. At the relevant time of accident, the claimants and others were travelling in said Jeep as fair paying passengers. The Jeep was hired by them. They have agreed to pay hire charges @ 3.50 per kilo meter to the owner of the Jeep. In that view, the appellant – insurance has duly proved its case that owner-insured has committed breach of policy condition and use the vehicle for carriage of passenger for hire and reward. It is contended that respondent no.1 – owner of

the vehicle did not step into witness box. No circumstances brought on record to justify the order to pay and recover.

11. On the other hand, Mrs. Ansari, learned Advocate appearing for respondent no.1 – claimant in Appeal No.567/2005 supported the judgment and order passed by Tribunal.

12. Mrs. C.S. Deshmukh, learned Advocate appearing for the respondent no.2 submitted that there was no negligence and fault on the part of the driver of Jeep in causing accident. It is contended that the accident was solely occurred due to fault on the part of driver of truck who parked the truck on the middle of road without proper preventive measures to avoid accident. The claimants have not made the owner, driver and insurance company of the truck as party to respective

Petitions. It is submitted that the owner, driver and insurance company of the truck involved in the accident were necessary parties to petitions and Tribunal ought to have dismissed petitions for want of necessary parties.

13. I have carefully considered the submissions advanced, in the light of judgment and award passed by the Tribunal. In my view, there is no perversity in the judgment and award passed by the Tribunal. It is admitted position that the Jeep in question was insured with the appellant – insurance company. The copy of policy produced on record spell out that Tata Sumo Car was insured with the appellant – insurance company covering the date of accident. It was insured as passenger vehicle with carriage capacity of 1 + 9 (i.e. driver + 9 passengers). The premium of

Rs.8,283/- shown to be paid by the insured. Except the investigator no one examined from the appellant – insurance company to establish that there was fundamental breach of policy condition on the part of owner-insured. Although the plea was raised that the driver of Jeep was not holding the valid and effective licence and the vehicle was used for hire and reward, the Officers from the insurance company failed to step into witness box in support of its plea/defence. No fundamental breach of policy condition established on the part of appellant – insurance company to refuse to pass order of pay and recover. On analysis of rival pleadings and evidence adduced in the case, the Tribunal has reached to the conclusion that the insurance company bound to satisfy the award and may recover the same from owner-insured. In paras 10 and 11, the Tribunal has noted as under:-

"10. The learned counsel for the respondent-insurance company submitted that the owner has committed breach of policy which disentitles him for to be indemnified. As per Section 147 M.V. Act, the policy shall cover the passengers in the vehicles. According to Section 149 of the M.V. Act, it is the duty of the insurer to satisfy the judgments and awards against persons insured in respect of third party risks. As per sub-sec (2) of Sec. 149 M.V. Act, the insurance company can defend the action on the ground that there has been a breach of specified condition of the policy, namely, the condition excluding the use of the vehicle for hire or reward when it is not covered by the permit to ply for hire or reward, or it is driven by person without licence. Relying upon this, the learned counsel submitted that the vehicle in accident was not insured as a vehicle with permit to ply for hire or reward and therefore, it be not held liable. Reference can be made to sub-section (4) of Sec. 149. According to it, the policy as purports to restrict the insurance of the persons insured with reference to any conditions other than in clause (b) of sub-section (2) shall be of no effect. These conditions refer to the goods vehicle and a public service vehicle. It is further provided that any sum paid by insurer in or towards the discharge of any liability which is covered by the policy by virtue of sub-sec. (4) only, shall be recoverable from that person. It is thus clear that in this case, it was not a vehicle used for racing or speed testing. The defence open to the insurance company was either under sub-clause (a) or sub-clause (b). The defence raised by the insurance company if is covered under sub-section 2(a) Sec. 149 M.V. Act, in my opinion, the insurance company has to pay this amount with liberty to recover the same from the owner.

11. In the result, the award can be passed against both the respondents with a permission to insurance company to recover the amount paid to the petitioner from the respondent no.1 – owner."

14. The judgment and award passed by the Tribunal to pass order of pay and recover against the appellant – insurance company is in consonance with law laid down by the Hon'ble Apex Court in the case of **National Insurance Company Ltd., V/s Swaran Singh and others** reported in (2004) 3 SCC 297. In para 110 the Hon'ble Apex 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."

15. In the case of **Shamanna and another V/s Divisional Manager, Oriental Insurance Company Ltd., and others** reported in (2018) 9 SCC 650, the Hon'ble Apex Court after taking survey of the decision on the issue of pay and recover observed that the decision in the case of '**Swaran Singh**' still hold the field and upheld the judgment and award passed by

Tribunal to pay and recover the amount from the owner-insured by setting aside the judgment and award passed by the High Court in appeal. In paras 13, 14 and 15, the Hon'ble Apex 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."

16. In view of above, the impugned judgment and award passed by Tribunal calls for no interference in exercise of appellate jurisdiction of this Court. Hence the appeals deserve to be dismissed. Accordingly the appeals are dismissed with no order as to costs.

[V.L. ACHLIYA]
JUDGE

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