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

FIRST APPEAL NO.559 OF 2007

New India Assurance Company Ltd
Through it's Divisional Managar
Adalat Road, Aurangabad. ... Appellant
(Orig. Resp. No.2)

Versus

1. Vimalabai W/o. Devidas Thube
Age : 42 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.
Mr.M.S. Deshmukh, Advocate h/f Mr. S.S. Pathale, 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, Aurangabad in Motor Accident Claim Petition No.122/2004 dated 11.08.2006, 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 was committed breach of condition of policy. So also the driver of the said vehicle was not holding requisite licence to drive the 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. On the ground of breach of policy condition as well as risk of the passengers being 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 No.1 to pay the compensation of Rs.68,850/- (inclusive of NFL) with interest @ 7.5% pa. till deposit of amount. The respondent no.2 though held to be not liable to pay compensation, but directed to

satisfy the award and to recover the amount from respondent no.1 by filing execution proceeding. Being aggrieved by the order to pay and recover the compensation from respondent no.1 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 pay and recover the amount. It is contended that though the Apex Court has passed orders in some of the cases to pay the amount of compensation to claimant by insurance company and recover the same from the owner of the vehicle, in peculiar facts and circumstances of the cases and same can not be treated as precedent to be followed by Tribunals. In the facts and circumstances of the case, in absence of risk of passengers covered under

insurance policy and fundamental breach of conditions of policy, on the part of owner of the vehicle-insurer, no such direction to pay and recover the amount should have been passed against the appellant-insurance company.

7. On the other hand, the learned counsel for the respondent no.1 supports the judgment and order passed by the Tribunal. It is contended that the judgment and award passed by the Tribunal is well reasoned and suffers from no perversity. In support of the submission that the judgment and award passed by the Tribunal is in consonance with the settled position in law, the learned counsel has referred and relied upon the decision of the 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 in the case and the reasons and findings recorded by the Tribunal. In my view, the judgment and award passed by the Tribunal suffers from no perversity, so as to call for interference in exercise of appellate jurisdiction of this Court. The judgment and award

passed by the Tribunal to pay and recover is in tune with the law laid down by Hon'ble Apex Court. 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, on the face of judgment and award passed by the Tribunal, it cannot be said that the award passed by the Tribunal suffers from perversity and contrary to law. The judgment and award passed by Tribunal is in tune with the principle of 'pay and recover' laid down by the Hon'ble Apex Court in the case of ***Swaran Singh*** and followed in ***Laxmi Narain Dhut*** and other cases, which still hold the field and operate as binding precedent for the Tribunals.

11. As observed in the case of ***Anu Bhanvara etc.*** (supra), the principle of 'pay and recover' to be applied depending upon the peculiar facts and circumstances of the case. In the peculiar facts and circumstance of the case, the Tribunal thought it fit to apply the principle of 'pay and recover' and direct the insurance company to pay and recover the amount from owner/insured. The Tribunal has observed that the case against the respondent no.1-owner is proceeded ex parte. In order to avoid hardship to the claimant, the order of pay and recover has been passed in the

matter. After more than 20 years of accident, it is not desirable for this Court to examine the correctness of findings recorded by Tribunals as to existence of peculiar circumstances to pass the order of pay and recover.

12 The accident had taken place in the year 2000. Award was passed on 11.08.2006. The appeal was preferred in the year 2007. The claimant is one of such passenger travelling in said vehicle with other passengers. They were travelling as pilgrims and they were on pilgrimage to Pandharpur to take *Darshan of* Lord Vitthal and Goddess Rukhmini. While returning from pilgrimage, the incident occurred. As against the claim of Rs.1,00,000/-, the compensation of Rs.68,850/- has been awarded which is inclusive of amount of Rs.25,000/- paid as no fault liability. For this reason alone, no interference to be made with the judgment and award passed by Tribunal. In the result, the appeal deserves no consideration on merit and deserves to be dismissed. Accordingly, the appeal is dismissed along with civil applications if any pending. In the circumstances, there shall be no order as to costs.

(V.L. ACHLIYA)
JUDGE

SPR