

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2004 OF 2009

United India Insurance Company Ltd.,
Through its Divisional Office,
Divisional Manager, Osmanpura,
Aurangabad

.. Appellant
(Orig. Respondent no. 6)

Versus

- 1] Ashintabai W/o Jeevan Tupe,
Age : 40 years, Occu : Household,
R/o : Pimpalwadi,
Tq. and Dist. Beed
- 2] Jayashri D/o Jeevan Tupe,
Age : 18 years,
- 3] Bajirao S/o Jeevan Tupe,
Age : 11 years,
- 4] Kondiba S/o Girjappa Tupe,
Age : 79 years, Occu : Agril.,
R/o : As above
- 5] Pandurang S/o Tukaram Bhat,
Age : 34 years, Occu : Jeep Driver,
R/o : Bhadole, Tq. Hatkangle,
Dist. Kolhapur
.. **[Appeal is abated as against Respondent
no. 5 as per Order Dt. 22-06-2010]**
- 6] Deelip S/o Shamrao Birgule,
Age : 40 years, Occu : Truck Driver,
R/o : Sambhaji Chowk, Islampur,
Tq. Walwa, Dist. Sangali
- 7] Pandurang S/o Annappa Nandiwal,
Age : Major, Occu : Business of Truck Transport,
R/o : Bhadole, Tq. Hatkangle,
Dist. Kolhapur,
- 8] Ramchandra S/o Rangrao Chavan,
Age : Major, Occu : Transport Business,
R/o : Sambhaji Chowk, Islampur,
Tq. Walwa, Dist. Sangli

9] Divisional Manager, National Insurance
Company Ltd., Hazari Chambers,
Station Road, Aurangabad

.. Respondents
(Respondents no. 1 to 4 are Orig.
Claimants, Respondent no. 5 to 9
are Orig. Respondents no. 1 to 5)

...

Mr. S.V. Kulkarni, Advocate for appellant
Mr. Abhijeet Thombre, Advocate h/f. Mr. S.S. Thombre, Advocate for
respondents no. 1 to 4

Mr. A.B. Kadethankar, Advocate for respondents no. 6 and 8
Mr. A.D. Soman, Advocate h/f. Mr. D.V. Soman, Advocate for respondent no. 9
Appeal is abated as against respondent no. 5 as per Order dated 22-06-2010
Respondent no. 7 served - absent

...

CORAM : ANIL S. KILOR, J.
DATE : 24-03-2021

ORAL JUDGMENT :

1. The appellant - insurance company has approached to this Court by way of present Appeal raising challenge to the Judgment and Order passed by the Motor Accident Claims Tribunal at Beed in Motor Accident Claim Petition No. 193 of 2004 dated 21-07-2008.

2. I have heard learned counsels for the respective parties.

3. The brief facts of the present case are that the claimants in this matter who are the respondents no. 1 to 4, are the legal representatives of deceased Jeevan Kondiba Tupe, who died in a motor accident on 11-11-1997. Claimant no. 1 is the widow of deceased whereas claimant no. 2 is their daughter and claimant no. 3 is their son. Claimant no. 4 is the father of the deceased.

4. It is the case of the claimants that on 11-11-1997, the deceased along with his family was travelling in a truck bearing number MH-10-A-9248 along with household articles for the work of cutting sugarcane and at that time one Trax jeep bearing registration number MH-09-G-2526 came from the opposite side and there was head-on collision between the truck and the jeep. Due to the collision, the truck got turtled and the deceased was driven out of the truck and he came underneath the cabin of the truck and died on the spot. It is the further case of the claimants that the accident occurred on account of rash and negligent driving of the driver of the truck as well as driver of the jeep. Accordingly, the claim petition was filed restricting the claim to ₹4,00,000/- though claiming to be entitled for ₹6,84,000/- towards compensation.

5. The appellant - Insurance Company i.e. respondent no. 6 before the Tribunal opposed the claim by filing written statement on the ground that the truck was being driven by a person who was not holding legal and valid license and for the purpose for which it was insured. It is the further case of the appellant - Insurance Company that the truck cannot be used as vehicle for carrying passengers and the risk of passengers is not covered. In the alternative, it was submitted that the death was caused due to contributory negligence of the driver of the truck and the jeep and, therefore, respondent no.6 alone cannot be held liable for the compensation. The learned Tribunal after scrutinizing the oral as well as documentary evidence brought on record by the parties to the claim petition, allowed the claim petition and thereby held

respondents no. 3 to 6 jointly and severally liable to pay an amount of ₹4,00,000/- towards compensation. In view of the contributory negligence, respondents no. 5 and 6 were directed to pay ₹2,00,000/- each.

6. The respondent no. 5 National Insurance Company has already complied with said order dated 21-07-2008 and deposited the amount in the Tribunal and the said amount is lying with the Tribunal. It is pertinent to note that respondent no. 5 has not filed any Appeal, questioning the validity and correctness of the impugned Judgment and Order.

7. The respondent no. 6 feeling aggrieved by the aforesaid Judgment and Order dated 21-7-2008 passed by the Tribunal has approached to this Court by way of present Appeal.

8. The appellant has deposited ₹ 1,00,000/- in this Court which was allowed to be withdrawn by the claimants vide Order dated 01-07-2009. Thereafter, this matter was admitted on 14-8-2009.

9. The learned counsel for the appellant had urged only one ground that the truck was a goods carrier truck which was involved in the accident and in which the deceased was travelling. It is submitted that the deceased was travelling as a passenger which can be considered as a gratuitous passenger who was travelling in a goods carriage. It is further submitted that the insurance cover was not there for the passenger and, therefore, the claimants cannot ask for any compensation from the appellant - Insurance Company or the Insurance Company is not liable to pay any amount to the claimants. It is submitted that if any entitlement is there of the claimants to receive the

compensation, it is against the owner of the truck and not against the Insurance Company.

10. Learned counsel for the appellant argues that since the claimants are not entitled under the policy to receive any compensation from the appellant - Insurance Company, in this matter the order of pay and recover cannot be passed. It is therefore submitted that the Judgment and Order impugned is erroneous and the same needs to be set aside to the extent the directions are issued to the appellant - Insurance Company to pay the amount of compensation. In support of his contentions, he has placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of ***National Insurance Co. Ltd. Vs Prema Devi and others***¹.

11. Per contra, learned counsel appearing for the claimants supports the Judgment and Order impugned in the present Appeal and points out that the accident took place in 1997. The Judgment and Order was passed in favour of the claimants in the year 2008 and till date, the claimants have received only ₹ 1,00,000/- whereas the amount of ₹ 2,00,000/- is lying before the Tribunal, which was deposited by the respondent no. 9 Insurance Company herein.

12. He further points out that because of pendency of this Appeal, the amount deposited before the Tribunal was not allowed to be withdrawn and in this peculiar facts and circumstances, if now the claimants are asked to recover the amount from the owner of the truck, it will be double jeopardy.

¹ 2008 AIR SCW 2023

13. Shri. Thombre counsel for the claimants has placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of ***Manuara Khatun and others Vs Rajesh Kr. Singh and others***² and submits that in identical facts and circumstances, the Apex Court directed the Insurance Company to pay and recover. He therefore, submits that the same mode may be adopted in this matter also.

14. To consider the rival contentions of the parties, I have gone through the record and Judgment of the Tribunal and also the judgments cited by both the parties.

15. The only issues which falls for consideration is whether the deceased was travelling in a goods carriage having no insurance cover for the passenger and whether the Insurance Company is liable to pay the amount of compensation even on the basis of pay and recover?

16. The said issues are no more res-integra after the judgment in ***Manuara Khatun*** (supra) wherein after considering the various judgments of the Apex Court, the Apex Court has observed that travelling in an offending vehicle as a gratuitous passenger will not make the insurance company liable to suffer liability arising out of the accident on the strength of the insurance policy, however, keeping in view the benevolent object of the Act and other relevant factors arising in the case, the directions to the Insurance Company to pay the awarded sum to the claimants and then recover the said sum from the

2 *AIR 2017 SC 1204*

insured in the same proceedings on applying principle of pay and recover can be passed. Paragraph 17 of the said judgment is relevant which reads thus:

“17. Justice R.M. Lodha (as His Lordship then was and later became CJI speaking for the Bench held in paras 20 and 26 as under :

20. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the Insurance Company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (Respondent 2 herein).

26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in *Baljit Kaur* MANU/SC/009/2004 : (2004) 2 SCC 1 and *Challa Upendra Rao*, MANU/SC/0779/2004 : (2004) 8 SCC 517 should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 (National Insurance Co. Ltd. V. Saju P. Paul SLP © No. 20127 of 2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1)

may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the Appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in *Challa Upendra Rao* (supra).”

17. On the touchstone of the above referred principle of law, if the evidence in the present case is considered, it will be revealed that the facts and circumstances of the present case are identical to the facts and circumstances of the case mentioned in the aforesaid judgment of the Apex Court. In that view of the matter, I am of the considered view that though the appellant Insurance Company cannot be held liable to suffer the liability in this matter on the strength of the insurance policy, however, after considering the relevant factors arising in this case and referred above, to cause the ends of justice, directions to the Insurance Company to pay the amount of compensation to the claimants and recover the same from the owner is warranted. Accordingly I pass the following order.

ORDER

- I] The Appeal is partly allowed.
- II] The appellant - Insurance Company is directed to make the payment of compensation as directed by the learned Tribunal vide judgment

and order dated 21-7-2008 to the claimants after deducting the amount already paid, within a period of two months from today.

III] The claimants are permitted to withdraw ₹ 2,00,000/- along with interest accrued thereon, deposited by the respondent no. 9 herein, before the Tribunal.

IV] It is made clear that the appellant Insurance Company is permitted to recover the amount from the owner of the truck involved in the accident.

V] The Appeal is disposed of. No order as to costs.

VI] In view of disposal of the Appeal, Civil Application no. 585 of 2009 stands disposed of.

[ANIL S. KILOR]
JUDGE

arp/