IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

FIRST APPEAL NO.1009 OF 2015

Ushabai Wd/o Rajabhau Aney,
Aged about 62 years, Occp- Nil
R/o Plot No.M-25, Modenr Society,
Subhadra Apartment, Pratap Nagar,
Nagpur.

.....APPELLANT
(Orig. petitioner)

...V E R S U S...

1. Shri Ahasan Khan s/o Habib Ulla Khan
   Aged about – Major, Occ- Owner,
   R/o Ashok Ward, Seoni,
   Dist. Seoni (M.P.)

2. The Divisional Manager,
   United India Insurance Co. Ltd.,
   Seoni, through Nagpur D.O.,
   Shankar Nagar Chowk, W.H.C.
   Road, Dharampeth, Nagpur.

.... RESPONDENTS

Shri B.S. Mandhare, Advocate h/f Shri P.S. Mirache, Advocate for appellant.
Shri B. Lahiri, Advocate for respondent no.2.

CORAM:- PUSHPA V. GANEDIWALA, J.
DATED :- 2nd August, 2021.

ORAL JUDGMENT :

. This is the claimant's appeal against the judgment and award dated 06.02.2013 in Claim Petition No.60 of 2007 passed by the learned Member of Motor Accident Claims Tribunal, Nagpur, whereby the learned Tribunal partly allowed the claim and directed respondent no.1, the owner of the offending vehicle to pay Rs.14,41,144/- to the claimant, exclusive of the amount of no fault liability, with interest @7.5% per annum from the date of order, till realization.

2. The facts, in nutshell, may be stated as under:

The appellant/claimant is mother of the deceased Anirudha, who died in a motor vehicular accident on 18.12.2006. It is the case of the claimant that on 18.12.2006 the deceased had boarded a jeep bearing registration No.MP-22/B-9173 at M.P. Bus Stand, Nagpur along with other passengers. The said jeep left for Seoni at about 17:30 hours from Nagpur. When it reached near territorial limits of Chorbhauli on Nagpur-Jabalpur road, due to rash and negligent driving, the driver lost control and hence the vehicle turned turtle and consequently dashed against a road side tree in which deceased Anirudha died on the spot along with three other passengers.

3. The claim petition for Rs.13,00,000/- was filed against owner and insurance company of the offending vehicle. It is not disputed that the offending vehicle was duly

and effectively insured with respondent no.2-Insurance Company. Both the respondents i.e. owner and insurer of the vehicle filed their respective written statements disputing the claim.

4. Learned Tribunal framed necessary issues and recorded evidence as adduced by the parties.

5. The petitioner examined herself and one Pramod and brought on record the following documents ;

> Form Comp AA (Exhi.31-A), copy of F.I.R. (Exh.32), copy of Spot Panchanama (Exh.33), Inquest Panchanama (Exh.34), Post-mortem Report (Exh.35), Mark-sheet of SCC (Exh.37) and Salary slip of deceased (Exh.48).

6. The respondents preferred not to examine any witness in support of their pleadings. On the basis of material on record, the learned Tribunal recorded the finding that on 18.12.2006 the deceased Anirudha died in the vehicular accident involving jeep bearing No.MP-22/B-9173 due to rash and negligent driving of driver of the said jeep. The learned Tribunal held the owner of the vehicle liable to pay

compensation to the claimant. The learned Tribunal exonerated the respondent no.2-Insurance Company mainly on the ground that there is a breach of terms and condition of the insurance policy as it is proved that in the said vehicle 11 passengers were being carried at the time of accident while there was a permit of only 10 persons including driver and it was used for commercial purposes.

7. I have heard Shri B.S. Mandhare, learned counsel holding for Shri P.S. Mirache, learned counsel for the appellant and Shri B. Lahiri, learned counsel for respondent no.2-Insurance Company. Learned counsel for appellant restricted his argument only with respect to the direction to respondent no.2-Insurance Company to pay the compensation amount and to recover the same from respondent no.1, the owner of the offending vehicle. Learned counsel relied on **Amrit Paul Singh and another Vs. Tata AIG General Insurance Co. Ltd. and others** reported in **(2018) 7 SCC 558** in support of his submissions.

8. Learned counsel for respondent no.2-Insurance Company opposed the prayer on the ground that the owner

of the offending vehicle has committed fundamental breach of policy by carrying more passengers than was permitted to the said vehicle and as per the terms of the policy, the vehicle was to be used for private use only. However, the owner used it for carrying the paid passengers. The learned counsel urged to dismiss the appeal.

9. The only question for the consideration of this Court is "whether the direction in the nature of 'pay and recover' can be issued against respondent no.2-Insurance Company in the facts and circumstances of the present case?"

10. It cannot be disputed that, there are series of judgments of Hon'ble Apex Court and this Court wherein the directions for 'pay and recover' have been issued. In the case of **United India Insurance Co. Ltd. Vs. K.M.Poonam and others** reported in **2011 ACJ 917** the Hon'ble Supreme Court relied on the case of **National Insurance Co. Ltd. Vs. Baljit Kaur** reported in **(2004) 2 SCC 1** and in the similar facts and circumstances directed the insurance company to deposit the total amount of compensation awarded to the claimants with liberty to the insurance company to recover the same. In that

case the jeep was carrying overloaded passengers against the capacity of 6 passengers.

11. The Hon'ble Apex Court in the case of **Amrit Paul Singh And Another Vs. Tata AIG General Insurance Company Limited And Others,** reported in **(2018) 7 SCC 558** in para 24 has held that as nothing has been brought on record by the insured to prove that he had a valid permit of the vehicle, in such a situation, the onus cannot be cast on the insurer. The Hon'ble Apex Court directed the Insurance Company to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The Hon'ble Apex Court stated that the said directions are in consonance with the principles as stated in **National Insurance Co. Ltd. Vs. Swaran Singh,** reported in **(2004) 3 SCC 297** and other cases pertaining to 'pay and recover' principle.

12. In the case in hand, evidently, the insurance policy covered 10 persons including driver and the appellant -owner was held to have carried 11 persons at the relevant time. It is nobody's case that the cause of the accident was only because

the offending vehicle was found carrying one more passenger than the limits of passengers insured. Further, the contention is that the vehicle was used for carrying the paid passengers which is nothing but the breach of the condition in the policy. Again, it is nobody's case that the cause of the accident was only because the vehicle was used for the hire purposes. In this backdrop, this Court is of the considered view that, Respondent No.2-the insurer of the offending vehicle cannot shirk its foremost liability to pay the compensation to dependents of the deceased, who was occupant of the vehicle meaning thereby third party vis-vis insurance company. In the light of the above discussion and by relying on the judgements in the case of **K. M. Poonam** (*supra*) and **Amrit Paul Singh** (*supra),* respondent No.2-Insurancy Company is directed to pay the entire amount of compensation to the claimant along with interest, and the respondent No.2-Insurance Company would be entitled to recover the same from the owner of the offending vehicle.

13. The learned Tribunal has failed to consider this aspect of the matter in the impugned judgment. Accordingly, the impugned judgment and award dated 06.02.2013 passed

by the learned Member, Motor Accident Claims Tribunal – 4, Nagpur in Claim Petition No. 60/2007 stands modified as under :

i) Respondent No.2 – Insurance Company shall pay enhanced compensation amount, i.e., Rs. 14,44,144/- to the claimant along with interest @ 7.5% per annum from 06.02.2013 till payment of the entire amount which is exclusive of amount towards 'No Fault Liability'.

ii) After payment of enhanced compensation, respondent No.2 – Insurance Company is at liberty to recover the same from the registered owner, i.e., respondent No.1. through execution proceedings.

iii) Realisation of the amount shall be subject to payment deficit Court fee.

14. With the aforesaid directions, the appeal stands partly allowed and disposed of. No costs.

JUDGE

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