IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1273 OF 2003

United India Insurance Co.Ltd.
Through it's Divisional Manager and
Authorised Representative and
Signatory, Ahmednagar Divisional
Office, Kisan Kranti Building,
Ahmednagar Appellant

Versus

1. Karbhari Gangadhar Bodkhe
Age : 50 years, occ : agri.,

2. Suman Karbhari Bodkhe
Age : 45 years, occ : household

Both r/o Keshawrao Mule Wada,
Chandrashekhar Chowk,
Sangamner, District Ahmednagar

3. Ashok Vitthal Thorat
Age : 22 years, occ :driver
R/o Wadgaon Pan,
Tal. Sangamner.

4. Atmaram Sukhdeo Thorat
Age : major, occ : business
R/o Wadgaon Pan,
Sangamner.

5. Sharif Maqbul Shaikh
R/o Shivaji Nagar, Rahuri
Factory, Taluka Rahuri Respondents

WITH
FIRST APPEAL NO. 1103 OF 2005

Atmaram Sukhdev Thorat
Age : 40 years, occ : agri.,
R/o Wadgaon Pan, Taluka
Sangamner, Dist. Ahmednagar Appellant

Versus

1. Karbhari Gangadhar Bodkhe
Age : 50 years, occ : agri.,

2. Suman Karbhari Bodkhe
Age : 45 years, occ : household

Both r/o Keshawrao Mule Wada,
Chandrashekhar Chowk,
Sangamner, District Ahmednagar

3. Ashok Vitthal Thorat
Age : 22 years, occ :driver
R/o Wadgaon Pan,
Tal. Sangamner.

4. United India Insurance Co. Ltd.
Through it's Branch Manager,
Kisan Kranti Building,
Ahmednagar.

5. Sharif Maqbul Shaikh
Age : 60 years, occ : agri.,
R/o Shivaji Nagar, Rahuri
Factory, Taluka Rahuri Respondents

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Mr. A.B. Gatne, Advocate for appellant in First Appeal No.1273 of 2003.
Mr. S.K. Shinde, Advocate for appellant in First Appeal No.1103 of 2005.
Mr. S.V. Dixit, Advocate for respondent Nos.1 and 2 in both appeals.
Mr. S.K. Shinde, Advocate for respondent Nos. 4 in First Appeal No. 1273 of 2003.
Mr. A.V. Deshmukh, Advocate for respondent No.3 in both appeals.
Mr. A.B. Gatne, Advocate for respondent No.4 in First Appeal No. 1103 of 2005.

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CORAM : **SANDIPKUMAR C. MORE, J.**

Judgment Reserved on : 04.08.2022.
Judgment pronounced on : 26.08.2022

Judgment:

1. Both these appeals are filed against one and the same award dated 17.07.2003 passed by the Member, Motor Accident Claims Tribunal (hereinafter referred to as "the learned Tribunal), Sangamner, District Ahmednagar in Motor Accident Claim Petition No. 1/2002 (old M.A.C.P. No. 300/1992).

2. First Appeal No. 1273/2003 is filed by the appellant – Insurance company i.e. the original opponent No.3 in claim petition, mainly on the two grounds that there was no privity of contract between itself and the registered owner of the offending vehicle Atmaram Sukhdeo Thorat i.e. the original opponent No. 2 and therefore it is entitled for exoneration from paying the compensation and that the deceased was not covered under the policy as it was an "act only" policy.

3. On the other hand, First Appeal No. 1103/2005 has been filed by the registered owner of the offending vehicle i.e. Atmaram Sukhdeo Thorat on the ground that the Insurance Company is in fact solely liable for paying the compensation.

4. It appears from the impugned judgment and award that the learned Tribunal has saddled the liability of paying compensation to the original claimants, who are respondent Nos.1 and 2 in both these appeals, upon both the appellants jointly and severally. It is significant to note that though there was joint and several liability upon the appellant Insurance Company in First Appeal No. 1273/2003 alongwith the appellant in First Appeal No. 1103/2005, but the appellant Insurance Company in it's appeal obtained stay to the execution of impugned award at least in respect of itself. However, this Court, in the appeal preferred by the registered owner of the offending vehicle i.e. Atmaram Thorat in First Appeal No. 1103/2005, has directed him to deposit 75% amount of the award for staying execution of the impugned award. It appears from the record that the registered owner has deposited certain amount of compensation, which is allowed to be withdrawn by respondent Nos.1 and 2- original claimants.

5. Since both the appeals are arising out of the same judgment and award, I have taken up those appeals jointly for disposal.

6. The facts leading to these appeals are as under :

One Pravin Karbhari Bodkhe, who is the only son of respondent Nos.1 and 2, was proceeding to Mumbai on 24.12.1991 in one Jeep bearing registration No. MTJ-766 which was owned by appellant of First Appeal No. 1103/2005 i.e. Atmaram Sukhdeo Thorat. One Ashok Vitthal Thorat, who is respondent No. 3 in both the appeals, was driving the said jeep. However, the said jeep turned turtle due to high speed and fell in the ditch. Resultantly, Pravin sustained multiple grievous injuries and died on the spot. The original claimants had prayed for total compensation of Rs. 3,50,000/-, however, the learned Tribunal has awarded compensation of Rs. 1,75,000/- alongwith interest at the rate of 9% per annum from the date of filing of the application till it's realization, to be paid by both these appellants jointly and severally.

7. It is significant to note that both these appellants have not challenged the computation of compensation as done by the learned Tribunal, but the appellant Insurance Company is seeking it's exoneration from the liability of paying compensation to the claimants for the reasons mentioned herein-above. Whereas, the appellant registered

owner of the offending jeep has challenged the impugned award on the ground that since the offending jeep was insured with the appellant Insurance Company, the entire liability of paying the compensation is on of the Insurance Company only.

8. With the assistance of the rival counsel for the respective parties, I have gone through the entire documents on record alongwith the record and proceedings as well as the impugned judgment.

9. The learned Counsel for the appellant Insurance Company has relied on the following judgments :

(i) New India Assurance Co. Ltd. vs Asha Rani & others (2003) 2 SCC 223

(ii) M/s. National Insurance Co. Ltd. vs Baljit Kaur & others, 2004 AIR SCW 212

(iii) National Insurance Co. Ltd. Vs Cholleti Bharatamma AIR 2008 SC 484

(iv) National Insurance Co.Ltd. Vs Bommithi Subhyayamma 2005 ACJ 721

(v) United India Insurance Co. Ltd. vs Anubai Gopichand Thakare and others, 2008 (1) Mh.L.J. 73

(vi) New India Assurance Co. Ltd. vs Puja Satish Gavali and others, (2019) Bom CR 163

(vii) National Insurance Co. Ltd. vs Swaran Singh & ors. 2004 AIR SCW 663

(viii) United Insurance Co. Ltd. Nagpur vs Raghunath Domaji Sahare and others, 2017 (5) Mh.L.J. 623

(ix) Jagtar Singh Alias Jagdev Singh vs Sanjeev Kumar and others, (2018) 15 SCC 189

(x) Oriental Insurance Co. Ltd. vs Surendra Nath Loomba (2012) 12 SCC 792

(xi) Dr. T.V. Jose vs. Chacko P.M. alias Thankachan & ors AIR 2001 SC 3939

10. On the contrary, the learned Counsel for the original claimants also relied on the following judgments :

(i) New India Assurance Co. Ltd. vs. Asha Rani and others AIR 2003 SC 607

(ii) Manura Khatun vs. Rajesh Kr. Singh AIR 2017 SC 1204

(iii) Anu Bhanvara vs Iffco Tokio General Insurance Co.Ltd. AIR 2019 SC 3934.

11. The first objection raised by the appellant – Insurance company in First Appeal No. 1273/2003 to the impugned judgment and award, is that there was no privity of contract between the owner of the offending jeep i.e. Atmaram Thorat and itself in respect of the insurance policy, since one Sharif Maqbul Shaikh had in fact drawn the insurance policy. It is not in dispute that the said policy was in force at the time of accident. On perusal of the impugned judgment, it is evident that the learned Tribunal has fastened liability of

paying compensation upon the appellant Insurance Company mainly because the Insurance Company, without verifying name of registered owner, has accepted premium from Sharif Maqbul Shaikh and issued the policy, and therefore, it cannot deny the liability of paying compensation to the original claimants. Admittedly, it has come on record that the jeep bearing registration No. MTJ-766 involved in the accident was insured by respondent No.4 Sharif Maqbul Shaikh prior to it's registration with the appellant – Insurance Company and subsequently it was registered in the name of Atmaram Thorat as he had purchased the same from one Roshanbi Shaikh. As such, though the appellant in First Appeal No. 1103 of 2005 was registered owner of the jeep, but the same was in fact insured through respondent No.4 Sharif Maqbul Shaikh. The appellant Insurance Company has taken a defence that there was no privity of contract between owner of the offending jeep and itself under insurance policy, the liability for paying compensation cannot be saddled upon it. However, the Hon'ble Apex Court in one of it's judgment has observed that the insurance policy is in respect to the vehicle and hence normally it should run with the vehicle. As such, when the appellant Insurance Company without taking efforts for searching the true owner issued policy in respect of the offending vehicle, then it cannot be said that it can avoid the liability of paying compensation under such policy. Therefore, I do not find any force in the submission of the learned Counsel for the appellant Insurance Company.

12. The second objection raised by the learned Counsel for the appellant Insurance Company appears somewhat serious. According to him, the Insurance Company cannot be held liable at all for paying compensation to the victim since the insurance policy was only an “act only policy” and not a comprehensive or package policy. The learned Counsel for the appellant Insurance Company vehemently submitted that when the nature of insurance policy being “act only” policy is established, then under such policy the risk of third party can only be covered. He further submits that the deceased was occupant of the offending jeep and he was in fact a gratuitous passenger, and therefore, cannot be treated as third party. In support of such contention, learned Counsel for the Insurance Company relied upon various judgments to ascertain as to whether the “act only” policy covers the risk of occupants in the offending vehicle who do not fall under the definition of third party.

13. In the case of ***Jagtar Singh Alias Jagdev Singh vs Sanjeev Kumar and others*** (supra), it has been observed by the Hon'ble Apex Court that the liability of Insurance Company in respect of the occupants / gratuitous passengers in a private car depends on whether the policy is a "comprehensive policy" / "package policy" or whether it is just an "Act policy". While deciding this aspect, it is opined that the occupants and gratuitous passengers in a car can be covered only in the case of comprehensive / package policy and the Act policy does not cover such passengers because it only covers third party risk. In the case of ***Oriental Insurance Co. Ltd. vs Surendra Nath Loomba*** (supra), the same observation is made. In the said case the matter was remanded to the learned Tribunal for enabling the parties to ascertain the nature of policy. In the case of ***Dr. T.V. Jose vs. Chacko P.M.*** (supra) again we find similar observation. In the light of these observations, if we peruse the insurance policy in question which is filed on record before the learned Tribunal, it is clearly evident that it is an "Act policy" since it is mentioned on the policy itself at top right hand corner that it was "A" policy in respect of private car. Moreover, on further perusal of the policy conditions, it appears that it only covers risk of third parties. Nothing appears from the said

policy that there was any extra premium paid for covering the risk of occupants of the said jeep. Thus, from the policy itself it appears that it covers the risk of only third party and the risk of occupants or passengers of the said jeep is not covered. Therefore, it can safely be inferred that the policy, which was valid at the time of accident, had not covered the risk of the deceased in the instant case.

14. Further, the learned Counsel for appellant Insurance Company also relied on other various judgments as mentioned herein-above for the purpose that once the risk of such occupants or passengers under the policy is not covered, then no order can be passed against the Insurance Company for saddling the liability to pay compensation, if the victim of the accident is found to be from these categories. In the case of ***United Insurance Co. Ltd. Nagpur vs Raghunath Domaji Sahare and others*** (supra), it is observed that even the Insurance Company in the cases of gratuitous passenger being an occupant of the vehicle, cannot be asked first to satisfy the award and then to recover the amount of award from the owner of the offending vehicle. Further, the Hon'ble Apex Court in the case of ***New India Assurance Co. Ltd. vs Asha Rani & others*** (supra), has discussed Section 147 of the

Motor Vehicles Act as it stood prior to 1994 Amendment alongwith other sections in respect of third party risk. In this judgment itself it has been mentioned that the Apex Court in it's earlier decision in the case of New India Assurance Company vs. Satpal Singh had not laid down the law correctly and it was to be overruled. Besides the aforesaid judgments, there are other judgments also on record as mentioned herein-above. However, sum and substance of those judgments is that the gratuitous passengers are not covered under the policy, and therefore, no liability can be fastened upon the Insurance Company for paying compensation to such passengers, in view of the breach of policy condition. Thus, it is submitted by the learned Counsel for the appellant Insurance Company that when the Insurance Company is not at all liable for paying the compensation, it would be absurd to ask it to satisfy the award first and to recover the same from the owner.

15. On the contrary, learned Counsel for the original claimants also relied on the judgments of the Hon'ble Supreme Court in the cases of ***Manura Khatun vs. Rajesh Kr. Singh*** and ***Anu Bhanvara vs Iffco Tokio General Insurance Co.Ltd.*** (supra) and submitted that though the policy involved

in those cases was not supposed to cover the risk of the victims therein, but the Hon'ble Supreme Court, after exonerating the Insurance Company from such liability, had directed it to satisfy the award first and then to recover the same from the owner.

In the case of ***Manura Khatun vs. Rajesh Kr. Singh*** (supra), the Hon'ble Apex Court has made the following observation in para Nos. 14, 15, 16 and 17 :

> *14) The only question, which arises for consideration in these appeals, is whether the appellants are entitled for an order against the Insurer of the offending vehicle, i.e., (respondent No. 3) to pay the awarded sum to the appellants and then to recover the said amount from the insured (owner of the offending vehicle-Tata Sumo)-respondent No.1 in the same proceedings.*
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> *15) The aforesaid question, in our opinion, remains no more res integra. As we notice, it was subject matter of several decisions of this Court rendered by three Judge Bench and two Judge Bench in past, viz.,National Insurance Co. Ltd. vs. Baljit Kaur & Ors., (2004) 2 SCC 1, National Insurance Co. Ltd. vs. Challa Upendra Rao & Ors., (2004) 8 SCC 517, National Insurance Co. Ltd. vs. Kaushalaya Devi & Ors., (2008) 8 SCC 246, National Insurance Co. Ltd. vs. Roshan Lal, [Order dated 19.1.2007 in SLP© No. 5699 of 2006], and National Insurance Co. Ltd. vs. Parvathneni & Anr., (2009) 8 SCC 785.*
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> *16) This question also fell for consideration recently in Manager, National Insurance Company Limited vs. Saju P. Paul & Anr., (supra) wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer*

the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover".

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, (2004) 2 SCC 1 and Challa Upendra Rao, (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. vs. Saju P. Paul, SLP (C) 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)."

Further, in the case of ***Anu Bhanvara vs Iffco Tokio General Insurance Co.Ltd.*** (supra) also the Hon'ble Apex Court has taken similar view of pay and recover, especially when the victims being gratuitous passengers in the case vehicle was not covered under the insurance policy. It is specifically observed in that judgment in para Nos.11 and 12 as follows :

> *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.*
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> *12. Accordingly, these appeals are disposed of with the direction that the respondent no.1 – insurance company shall be liable to pay the awarded compensation to the claimants in both the appeals. However, respondent no.1 – insurance company shall have the right to realize the said amount of compensation from the respondents no. 2 and 3 (driver and owner of the vehicle) in accordance with law".*

Thus, from these observations, it has been made abundantly clear by the Hon'ble Apex Court that considering the peculiar facts of the case, the principle of "pay and recover" can be invoked even though it is found that the

Insurance Company is not liable to pay the compensation, in view of the breach of policy conditions.

17. In the instant matters, the learned Tribunal has directed the appellant Insurance Company and owner i.e. the appellant in connected First Appeal No. 1103 of 2005 to pay compensation jointly and severally to the original claimants. However, it has come on record that the policy, which was in force at the time of accident, had not covered the risk of victim in this case, who was only a gratuitous passenger in the offending vehicle. However, the victim i.e. the deceased was only son of claimants and considering this fact, in the light of the observation of the Hon'ble Apex Court in the aforesaid judgments relied upon by the learned Counsel for the claimants, a direction to pay the compensation can be given to the appellant Insurance Company and to recover the same from the owner of the offending vehicle. With this observation, First Appeal No. 1273 of 2003 needs to be allowed partly by issuing such direction.

18. Since it has been concluded by this Court that the appellant Insurance Company needs to be exonerated from the liability of paying compensation, but to satisfy the award first and then to recover the same from the owner, the

another connected First Appeal No. 1103 of 2005 needs to be dismissed which claims that the Insurance company exclusively is liable for paying the compensation to the claimants.

19. It appears that the appellant Insurance Company has not deposited any amount of compensation since certain amount was deposited by the owner of the offending jeep, who is appellant in First Appeal No. 1103 of 2005. The said amount has already been withdrawn by the claimants. Therefore, the remaining amount of the award is to be paid by the appellant Insurance Company and the same can be recovered from the owner of the offending jeep.

19. In view of the above observations, the following order is passed.

ORDER

(i) First Appeal No. 1273 of 2003 is hereby partly allowed and the appellant Insurance Company is exonerated from the liability of paying compensation to the claimants. However, it shall pay the remaining amount of compensation to the original claimants alongwith the same rate of interest as awarded by the learned Tribunal first, till it’s realization. The appellant Insurance

Company will be at liberty to recover such amount paid to the original claimants from the registered owner of the offending vehicle i.e. the appellant in First Appeal No. 1103 of 2005.

(ii) The connected First Appeal No. 1103 of 2005 stands dismissed.

(SANDIPKUMAR C. MORE, J.)

VD_Dhirde