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

FIRST APPEAL NO. 3073 OF 2008
WITH
CIVIL APPLICATION NO. 10791 of 2021 in FA/3073/2008

United India Insurance Company Ltd.
Through Divisional Manager,
Divisional Office, Jalgaon. …. Appellant
(Orig. Respondent No.2)

Versus

1. Smt. Hanuben Baburao Padvi,
Age : 48 years, Occu. : Household,

2. Shri. Kiranbhai Baburao Padvi,
Age : 22 years, Occu. : Labourer,
Both R/o. Newala, Tq. Nizar,
Dist. Surat, State - Gujrat

3. Yashwant Ajamsing Padvi,
Age : 40 years, Occu.: Owner of
Ape Rickshaw,
R/o. Sorapada, Tq. Taloda,
Dist. Nandurbar. … Respondents.
(R.Nos. 1 & 2 Orig. claimants
& R. No.3 orig. claimant no.3)

**WITH**

FIRST APPEAL NO. 193 OF 2009

United India Insurance Company Ltd.
Through Divisional Manager,
Divisional Office, Jalgaon. …. Appellant
(Orig. Respondent No.2)

Versus

1. Smt. Hanuben Baburao Padvi,
Age : 48 years, Occu. : Household,

2. Shri. Kiranbhai Baburao Padvi,
Age : 22 years, Occu. : Labourer,
Both R/o. Newala, Tq. Nizar,
Dist. Surat, State - Gujrat

3. Yashwant Ajamsing Padvi,
Age : 40 years, Occu.: Owner of
Ape Rickshaw,
R/o. Sorapada, Tq. Taloda,
Dist. Nandurbar. … Respondents.

(R.Nos. 1 & 2 Orig. claimants
& R. No.3 orig. claimant no.3)

….

Mr. S.V. Kulkarni, Advocate for the Appellant
Mr. P.C. Mayure, Advocate for Respondent Nos. 1 and 2
Respondent No.3 though duly served, remained absent.

….

**CORAM : SHRIKANT D. KULKARNI, J.**

**Reserved on : 20.12.2021**
**Pronounced on : 04.04.2022**

**JUDGMENT** :-

1. The order of “pay and recover” passed in M.A.C.P. No. 168 of 2007 by the Member, M.A.C.T. Shahada is challenged by the United India Insurance Co. Ltd., Divisional Office Jalgaon, by way of present appeal.

2. Babu (since deceased) was travelling with other four passengers in Ape Rickshaw, which was a goods vehicle. The said vehicle met with an accident on 25.11.2007, wherein Babu succumbed to injuries.

3. Respondent nos. 1 and 2 (original claimants) had filed claim under Section 166 of the Motor Vehicles Act, 1988 on account of death of Babu and also prayed for interim compensation by taking aid of Section 140 of the Motor Vehicles Act, 1988.

4. The Tribunal was pleased to grant interim compensation of Rs.50,000/- by passing order below exhibit 5 and directed to the owner of Ape Rickshaw and the insurer to pay the interim compensation with interest @ 8% per annum fro the date of claim petition. The claim went on trial. The Member, M.A.C.T. after considering the rival pleadings of the parties, evidence on record and considering the defence raised by the insurance company / appellant was pleased to hold that although the insurance company was not liable to satisfy the claim, but shall pay the amount of compensation of Rs. 2,67,000/- inclusive of N.F.L. amount @ 8% per annum and recover the same from the owner of Ape Rickshaw.

5. Feeling aggrieved by the impugned order of interim compensation and order of “pay and recover”, the appellant has knocked the doors of this Court, by preferring two appeals.

6. Heard Mr. S.V. Kulkarni, learned counsel for the appellant and Mr. P.C. Mayure, learned counsel for respondent nos. 1 and 2 / original claimants. Respondent no.3 / owner of the vehicle, remained absent though duly served with notices in both the appeals.

7. Mr. Kulkarni, learned counsel for the appellant / insurance company vehemently submitted that the deceased was travelling as a gratuitous passenger in Ape Rickshaw, which was a goods vehicle when met with accidental death. The risk of the deceased is not covered by the insurance policy obtained by the owner of the vehicle. It is a case of breach of policy. The Tribunal has considered this defence. However, while passing the final order, directed to pay the compensation amount of Rs.2,67,000/- with interest to the original claimants and recover the same from the owner of the Ape Rickshaw. The said order is bad in law. The insurance company is not liable to pay any amount of compensation when the risk of the deceased was not covered by the insurance policy of the vehicle. He, therefore, urged to set aside that clause of the operative order passed by the Tribunal. He also urged to set aside the order of interim compensation passed

by the Tribunal fastening the liability on the insurance company to pay the same, when the risk is not covered by the insurance policy.

8. Mr. Kulkarni, learned counsel for the appellant / insurance company has placed reliance on the following stock of citations:

(i) ***United India Insurance Co. Ltd. Vs. Smt. Mandubai and others*** reported in ***2019 (1) T.A.C. 547 (Bom.)***.

(ii) ***New India Assurance Company Ltd. Vs. Lilabai Shrimant Missal and others*** reported in ***2015 (1) Mh.L.J. 827***.

(iii) ***National Insurance Co. Ltd. Vs. Rattani and Ors.*** Reported in ***AIR 2009 SC 1499***.

(iv) ***National Insurance Co. Ltd. Vs. Prema Devi and Ors.*** Reported in ***2008 AIR SCW 2013***.

(v) ***Beliram Vs. Rajinder Kumar and another*** reported in ***AIR 2020 SC 739***.

(vi) ***United India Insurance Company Ltd. Vs. Sukumarbai W/o Suryakant Nikam*** [First Appeal No. 2021 of 2018 decided on 05.08.2019 (Aurangabad Bench)].

9. Per contra, Mr. P.C. Mayure, learned counsel for respondent nos. 1 and 2 / original claimants supported the order of “pay and

recover" passed by the Tribunal. He submitted that the earning member of the family of the claimants has lost life in a motor vehicle accident. Having regard to the facts of the case, the Tribunal has passed the order of "pay and recover". He submitted that the order of "pay and recover" passed against the insurance company / appellant cannot be said to be defective in the eye of law. He submitted that the Tribunal is empowered to issue such direction of "pay and recover" even the though defence of breach of policy is proved by the insurance company.

10. Mr. Mayure, learned counsel for the original claimants has also placed reliance on the following stock of citations:

(i) ***Shivawwa and another Vs. Branch Manger, National India Insurance Company Limited and another*** reported in ***2018 AIR (SC) 1640***.

(ii) ***Shivraj Vs. Rajendra*** reported in ***(2018) AIR (SC) 4252***.

(iii) ***Anu Bhanvara Etc. Vs. Iffco Tokio General Insurance Company Limited and others*** reported in ***AIR 2019 (SC) 3934***.

(iv) ***British India General Insurance Co. Ltd. Vs. Gaptain Itbar Singh and others*** reported in ***AIR 1959 SC 1331***.

(v) ***United India Insurance Co. Ltd. Vs. Shashi Prabha Sharma and others*** reported in ***(2015) 4 ACC 529*** (Allahabad High Court Full Bench decision).

(vi) ***Shamanna Vs. Divisional Manager, The Oriental Insurance Co. Ltd.*** Reported in ***AIR 2018 (SC) 3726***.

(vii) ***New India Assurance Co. Ltd., Bijapur by its Divisional Manager Vs. Yallavva and another*** reported in ***ILR 2020 KAR 2039*** (Full Bench decision).

11. Having regard to the submissions of the learned counsel for both the sides, I have studied the stock of citations relied upon by the learned counsel for the respective parties.

12. The doctrine of "pay and recover" was considered by the Supreme Court in case of ***National Insurance Co. Ltd. Vs. Swaran Singh and others*** reported in ***(2004) 3 SCC 297***, wherein the Supreme Court examined the liability of the insurance company in cases of breach of policy condition due to disqualifications of the driver or invalid driving licence of the driver and held that in case of third party risks, the insurer has to indemnify the compensation amount to the third party and the insurance company may recover the same from the insured. Elaborately considering the insurer's

contractual liability as well as statutory liability vis-a-vis the claims of third parties, the Supreme Court issued detailed guidelines as to how and in what circumstances, "pay and recover" can be ordered.

13. In case of ***National Insurance Co. Ltd. Vs. Parvathneni and another*** reported in ***(2009) 8 SCC 785***, the Hon'ble Supreme Court has referred the case to the larger Bench. The reference in case of ***Parvathneni*** (supra) has been disposed of by the Hon'ble Supreme Court on 17.09.2013 by keeping the questions of law open to be decided in an appropriate case.

14. Having regard to the above legal scenario, the position of law is still not settled, whether the insurance company can be directed to pay the compensation amount first and recover the same even though the insurance company has no liability to pay. There are citations from both the sides. The citations relied upon by Mr. Kulkarni, learned counsel for the appellant / insurance company are supporting to his argument. Whereas, the citations relied upon by Mr. Mayure, learned counsel for the claimants are supporting to his submissions.

15. In case of ***Swaran Singh*** (supra), the Hon'ble Supreme Court has made it clear that the Tribunal and the Courts are empowered to issue directions and pass the order of "pay and recover". The facts of each case are important and relevant while exercising such discretion to pass the order of "pay and recover".

16. The decision of the Apex Court, more particularly of recent time needs to be studied. Accordingly, I have studied the citations of the Apex Court relied upon by both the sides in order to find out what is the recent view of the Apex Court on the issue of "pay and recover" order, when the insurance company is not liable to pay any compensation.

17. In case of ***National Insurance Co. Ltd. Vs. Rattani and Ors.*** (supra), it is held by the Apex Court that if a gratuitous passengers travelled in a goods vehicle and met with an accident, the insurer cannot be made liable for compensation.

18. In case of ***National Insurance Co. Ltd. Vs. Prema Devi and Ors.*** (supra), it is held by the Apex Court that there is no liability of the insurer to settle the claim, if a gratuitous passenger found travelling in a goods carriage and met with an accident. The insurance company cannot be held liable to satisfy the claim.

19. In case of ***Beliram Vs. Rajinder Kumar and another*** (supra), it is held by the Apex Court that if owner of a vehicle while employing the driver on commercial vehicle like Truck did not verify about the driving licence of the driver and if that commercial vehicle Truck met with an accident, employer / owner of the vehicle cannot wash his hands off responsibility of not checking up whether driver has renewed licence. Gross negligence on the part of employer as insured in verifying driving licence. It is held by the Apex Court that insurance company is not liable to pay compensation. However, it was a case under the Workmen's Compensation Act, 1923 . In the present case, the petition is filed by the claimants under Section 166 of the Motor Vehicles Act, 988.

20. In case of ***Shivawwa and another Vs. Branch Manger, National India Insurance Company Limited and another*** (supra), it is held by the Apex Court that insurance company is liable to pay compensation to the dependents of deceased. In that case, the deceased who was the owner of the goods returning after unloading his goods at stipulated destination. The Truck met with an accident because of rash and negligent driving of the Truck driver. The insurance company raised the defence that at the time

of accident, deceased was not travelling with his goods in transport vehicle. In that background and considering the facts of the case, the Apex Court was pleased to direct the insurance company to pay the compensation.

21. In a very recent case of ***Shivraj Vs. Rajendra*** decided on 05.09.2018 by the Apex Court (supra), the Hon'ble Supreme Court directed to the insurance company to pay compensation amount determined by the Tribunal and affirmed by the High Court to the appellant in first place with liberty to to recover the same from owner of the offending tractor though the appellant travelled in tractor as a passenger even though tractor could accommodate only driver and insurance company was not liable for loss or injuries suffered by the appellant or to indemnify the owner of tract.

22. There is one more recent decision of the Apex Court in case of ***Anu Bhanvara Etc. Vs. Iffco Tokio General Insurance Company Limited and others*** decided on 09.08.2019 (supra), wherein the Hon'ble Supreme Court in para 11 has held as under:

> "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."

23. Having regard to the analysis of above referred stock of citations of the Apex Court, more particularly recent one (supra), it is very much clear that the Tribunal as well as the appellate Court may issue directions to the insurance company to satisfy the award first and then recover the same from the owner of the vehicle although not liable, having regard to the peculiar facts of the case.

24. There is no dispute that Ape Rickshaw is a goods vehicle and insured with the appellant at the time of accident. The risk of the deceased as a gratuitous passenger is not covered by the terms and conditions of the insurance policy of the vehicle / Ape Rickshaw. No additional premium is paid by the owner of the Ape Rickshaw to cover the risk of the deceased. There is no liability on the appellant / insurance company to settle the claim. However,

the object of the Motor Vehicles Act, 1988 cannot be overlooked. The Motor Vehicles Act, 1988 is a social welfare legislation under which the compensation is provided by way of award to the people who sustain bodily injuries or get killed in the vehicular accident. Those people who sustain injuries or whose kith and kins are killed, are necessarily to be provided with such relief in a short span of time so that the procedural technicalities cannot be allowed to defeat the just purpose of the Act under which such compensation is to be paid to such claimants.

25. In construing social welfare legislation, the Courts should adopt a beneficent rule of construction and in any event, that construction should be preferred which fulfills the policy of the legislation. Construction to be adopted should be more beneficial to the purposes in favour of and in whose interest the Act has been passed.

26 By taking into consideration the object of the Act and looking to the facts of the case in hand, the direction of “pay and recover” given by the Tribunal cannot be said to be improper and incorrect. The deceased Babu was doing job of collie at the time of the accident and shouldering the responsibility of maintaining his

family. Due to sudden death of Babu, the family is in a great difficulty. The claimants' family must be facing eminent financial difficultly apart from the mental pain and agony. In that background, the direction of "pay and recover" passed by the Tribunal need to be upheld so that the claimants may get some kind of help and support by this amount of compensation.

27. Having regard to the above reasons and discussion and, looking to the peculiar facts of the case in hand and, keeping in mind the object of the Motor Vehicles Act, 1988, although the appellant / insurance company is not liable to pay the compensation, need to satisfy the award first and recover the same from the owner of the vehicle. There is no need to interfere with the directions given by the Tribunal regarding "pay and recover". In the result, both the appeals need to be dismissed.

**O R D E R**

(i) Both appeals stand dismissed.

(ii) The impugned judgment and award and, order below exhibit 5 passed in M.A.C.P. No.168 of 2007 by the Member, M.A.C.T., Shahada is hereby confirmed.

(iii) No order as to costs.

(iv) Record and Proceedings be sent back to the Tribunal.

(v) In view of disposal of both the appeals, the claimants are hereby permitted to withdraw the compensation amount deposited by the appellant / insurance company with the Registry.

(vi) The appeals are accordingly disposed of.

(vii) In view of disposal of the first appeal no. 3073 of 2008, civil application no. 10791 of 2021 stands disposed of.

**[ SHRIKANT D. KULKARNI ]**
**JUDGE**

S.P. Rane