

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

**FIRST APPEAL NO.2344 OF 2019 WITH
CIVIL APPLICATION NO.8750 OF 2019**

The New India Assurance Company Limited,
through its Branch Manager,
Yashovallabh Complex,
Near Municipal Council, Dhule
Tq. & Dist. Dhule
through its Authorized Signatory/
Senior Divisional Manager.
In-charge Legal Hub,
Ajay Engineering Compound,
Near Kranti Chowk, Mahesh Compound,
Adalat Road, Aurangabad **... APPELLANT**

VERSUS

- 1) Yeshubai Bhimsing Gavit,
Age 65 years, Occu. Household,
- 2) Amita Bhimsing Gavit,
Age 29 years, Occu. Household
- 3) Raju Bhimsing Gavit,
Age 28 years,

All R/o Shirve, Tq. Taloda,
Dist. Nandurbar
- 4) Girishbhai Babubhai Patel,
Age major, Occu. Truck Owner,
R/o Sainath Nagar, Desara Billimora,
Tq. Gandevi, Dist. Navsari
(Gujrath State) **... RESPONDENTS**

.....
Mr. Mohit R. Deshmukh, Advocate for appellant
Mr. P.C. Mayure, Advocate for respondents No.1 to 3
Mr. Amit S. Savale, Advocate for respondent No.4.
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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 7th December, 2021

Date of pronouncing judgment : 18th April, 2022

J U D G M E N T :

This is an Insurance Company's appeal, taking exception to a judgment and award dated 12/2/2019, passed by Motor Accident Claims Tribunal (Tribunal), Nandurbar in Motor Accident Claim Petition (MACP) No.206/2014. The challenge herein is mainly to the direction to the appellant Insurance Company to pay respondents/ claimants the amount of compensation granted under the impugned award and then recover the same from the owner of the vehicle involved in the accident (respondent No.4).

2. Facts giving rise to the present appeal are as follows :-

A goods carriage – truck bearing Registration No.GJ-16/V-3312 met with the accident at 10.30 p.m. on 24/2/2014. Deceased Bhimsing was travelling in the ill-fated truck. The accident took place since the truck hit a roadside stone, whereby the deceased sitting on the back side plank of the truck fell out and died of the injuries suffered thereby. His

widow and two children (respondents No.1 to 3), therefore, preferred the petition for compensation. The Tribunal awarded compensation amounting to Rs.2,59,000/- with interest thereon. Since it was a goods carriage and risk of passengers travelling therein had not been covered under the policy of insurance, the Tribunal was pleased to direct the appellant Insurance Company to pay first and then recover the amount of compensation from the respondent No.4, owner of the truck.

3. Heard. The learned counsel for the appellant Insurance Company would submit that, the claimants (respondents No.1 to 3) had relied on First Information Report and the related papers of the accident. These documents unequivocally make out a case of the deceased having been travelling as paid passenger in a goods carriage. The policy of insurance granted by the appellant Insurance Company was in the nature of "Act only Policy". The deceased was neither an employee of the owner of the vehicle nor was he owner of the goods, carried in the truck, or authorised representative of such owner. As such, the appellant Insurance Company did not have liability to pay any compensation. The judgments of the Supreme Court relied on by the Tribunal for directing the

appellant Insurance Company to pay the amount of compensation first and then recover were passed in exercise of powers under Article 142 of the Constitution of India. The Tribunal did not have jurisdiction to pass such an order. The learned counsel has relied on a number of authorities and ultimately urged for setting aside the impugned award.

4. The learned counsel for the respondents No.1 to 3 claimants would, on the other hand, submit that, there are very many judgments of the Apex Court and the High Courts as well directing Insurance Company to pay compensation in such cases first and then recover the same from the vehicle owners. The learned counsel would submit that, the deceased was a very poor person. He is survived by his widow and two children. The amount of compensation is not more than Rs.2,60,000/-. He, therefore, urged for dismissal of the appeal in the given facts and circumstances of the case.

5. Considered the submissions advanced. Perused the impugned judgment and award. Gone through the evidence relied on. Perused the authorities relied on.

Admittedly, the deceased was travelling in a goods carriage truck No.GJ-16/V-3312. There is nothing in the

evidence to suggest that he was carrying with him goods of his own or that of his employer, if any, nor was he an employee of the owner of the truck. In short, the deceased was travelling either paid or gratuitous passenger in a goods carriage. The insurance cover granted by the appellant Insurance Company was in the nature of "Act only Policy". As such, the risk of any person other than the driver of the truck travelling therein had not been covered. Necessarily, the appellant Insurance Company did not have either statutory or contractual liability to pay the amount of compensation awarded by the Tribunal.

6. Both the learned counsel have relied on a host of authorities. The details thereof are as under :

The authorities relied on by the learned counsel for the respondents are :-

- (1) Shamanna Vs. Divisional Manager, the Oriental Insurance Co. Ltd. [(2018) AIR (SC) 3726]
- (2) Shivawwa & anr. Vs. Branch manager, National India Insurance Company Limited & anr. [2018 AIR (SC) 1640]
- (3) Shivraj Vs. Rajendra [(2018) AIR (SC) 4252]

- (4) New India Assurance Co. Ltd. Vs. Asha Rani & ors.
[(2003) 2 SCC 223]
- (5) Shamanna Vs. Divisional Manager, The Oriental Insurance Co. Ltd. [(2018) AIR SCW 3726]
- (6) Anu Bhanvara etc. Vs. IFFCO Tokio General Insurance Company Limited & ors. [(2019) AIR (SC) 3934]
- (7) United India Insurance Co. Ltd. Vs. Shashi Prabha Sharma & ors. [(2015) 6 ALL MR 59]
- (8) New India Assurance Co. Ltd. Bijapur by its Divisional Manager Vs. Yellavva & anr. [ILR 2020 KAR 2239]

7. While the authorities relied on by the learned counsel for appellant Insurance company are as under :-

- (1) Manuara Khatun & ors. Vs. Rajesh Kumar Singh & ors. Etc.
[(2017) 4 SCC 796]
- (2) Shivraj vs. Rajendra & anr. (Civil Appeal Nos.8278-8279 of 2018, decided on 5/9/2018)
- (3) Manager, National Insurance Company Limited. Vs. Saju P. Paul & anr. [(2013) 2 SCC 41]
- (4) National Insurance Company Limited Vs. Parvathneni & anr.
[(2009) 8 SCC 785]
- (5) New India Assurance Co. Ltd. through its authorized signatory Vs. Puja Satish Gavali & ors. [(2019) 6 Bom. CR 163]

8. Considered the submissions advanced. Perused all

the citations relied on. This Court is in complete agreement with the submissions made by the learned counsel for the appellant Insurance Company that the Tribunal and/or High Court have no statutory authority or jurisdiction to direct insurer to first pay the amount of compensation and then recover the same from the owner of the vehicle in the fact situation like one involved in the present appeal. This Court, therefore, would not propose to reproduce the observations made in the citations relied on behalf of the appellant Insurance Company.

9. There is, however, other aspect of the matter. The amount involved in the present appeal is small one. The deceased left behind a widow. The amount of compensation awarded under the impugned award has already been deposited in this Court.

10. In case of Shivraj (supra), the Apex Court, in paragraph no.10 of its judgment, has observed :-

“10. At the same time, however, in the facts of the present case the High Court ought to have directed the Insurance Company to pay the compensation amount to the claimant (appellant) with liberty to recover the same from the tractor

owner, in view of the consistent view taken in that regard by this Court in National Insurance Co. Ltd. Vs. Swarna Singh & ors. [(2004) 3 SCC 297], Mangla Ram Vs. Oriental Insurance Co. Ltd. [(2018) 5 SCC 656], Rani & ors. Vs. National Insurance Co. Ltd. & ors. [(2018) 9 SCALE 310] , and including Manuara Khatun and others Vs. Rajesh Kumar Singh and others [(2017) 4 SCC 796]. In other words, the High Court should have partly allowed the appeal preferred by the respondent No.2. The appellant may, therefore, succeed in getting relief of direction to respondent No.2 Insurance Company to pay the compensation amount to the appellant with liberty to recover the same from the tractor owner (respondent No.1.)”

11. It is true that the judgment of the Apex Court in case of National Insurance Co. Ltd. Vs. Swarna Singh & ors. Was relating to a breach of condition of the policy of insurance. The breach was specifically in the nature of driver of the ill-fated vehicle either not holding a driving licence at all or holding an invalid licence to drive the same. The facts of Shivraj’s case would indicate that the appellant therein was travelling on a tractor as a passenger. It was in breach of the policy condition. The tractor could accommodate only one person namely the driver. The Insurance Company was, therefore, not liable for the loss or injury suffered by the appellant therein. The observations in paragraph No.10 of the judgment in Shivraj’s case undoubtedly indicate that the Apex

Court had expected that the High Court ought to have directed the Insurance Company to pay the compensation amount to the claimant and then recover the same from the tractor owner.

12. The facts in Shivawwa's case (supra) would also indicate that the deceased was returning after unloading foodgrains on tractor trailer involved in the accident. Although the Insurance Company was not liable to pay compensation to legal representatives of the deceased, the Tribunal had passed the award against the insurer and the owner of the tractor with the direction to pay the amount of compensation jointly and severally. The High Court, in appeal, had upset the said order. The Apex Court set aside the judgment of the High Court and restored the one passed by the Tribunal.

13. The facts in case of Anu Bhanvara (supra) indicate that Anu was travelling in a goods vehicle. It has been observed by the Apex Court in paragraph No.11 as under :

“11. 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.”

14. The facts in Shamanna’s case (supra) would indicate that the claimant was travelling in a jeep. The Tribunal had directed the Insurance Company to pay the amount of compensation to the claimants with a liberty to recover the same from the owner of the offending jeep. The jeep driver did not have valid driving licence. As such, it would not be of much assistance to the respondents – claimants.

15. It is reiterated that, this Court is in agreement with the learned counsel for the appellant Insurance Company that such orders have been passed by the Apex Court in exercise of its plenary powers/ jurisdiction under Article 142 of the Constitution of India. While passing such orders, the Apex Court has some times on its own passed such orders for the first time and/or in some cases such orders passed by either Tribunal or the High Court have been upheld.

16. The Apex Court in case of Manuara Khatun (supra), relying on the judgment in case of Saju P. Paul (supra), observed as under :

13) 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.

14) 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, (2004) 8 SCC 517, National Insurance Co. Ltd. vs. Kaushalaya Devi & ors., (2008) 8 SCC 246, National Insurance Co. Ltd. vs. Roshal Lal, [Order dated 19.1.2007 in SLP (C) No. 5699 of 2006], and National Insurance Co. Ltd. vs. Parvathnni & anr., (2009) 8 SCC 785.

15) This question also fell for consideration recently in National Insurance Company Limited vs. Saju P. Paul & anr.[(2013) 2 SCC 41], 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. Although the Hon'ble Supreme Court in case of Parvathneni & anr. (supra), observed in paragraph No.3 of its judgment as under :

"3. Prima facie, we are of the opinion if the Insurance Company proves that it has no liability to pay compensation to the claimants, the Insurance Company can not be compelled to make payment and later on recover it from the owner of the vehicle.

4. No doubt, there are some decisions which have taken the view that even if the insurance company has no liability, yet it must pay and later on recover it from the owner of the vehicle. [See for example National Insurance Co. Ltd. vs. Yellamma & anr. (2008) 7 SCC 526, Samundra Devi Vs. Narendra Kaur (2008) 9 SCC 100 (vide para 16), Oriental Insurance Co. Vs. Brij Mohan (2007) 7 SCC 56 (vide para 13), New India Insurance Co. vs. Darshan Devi (2008) 7 SCC 416 (vide para 21), etc.]. We have some reservations about the correctness of the aforesaid decisions of this Court.

5. If the insurance company has no liability to pay at all, then, in our opinion, it can not be compelled by order of the Court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the compensation amount and later on recover it from the owner of the vehicle. In our view, Article 142 of the Constitution of India does not cover such type of cases.”

18. The issue was, therefore, referred to larger Bench of the Apex Court, which passed the following order :

“Application for impleadment is dismissed. Keeping in view the smallness of the amount involved, we are not inclined to entertain this petition under Article 136 of the Constitution. The special leave petition is dismissed accordingly. The questions of law raised in this petition are kept open to be decided in an appropriate case.”

19. After having perused the authorities referred hereinabove and in view of the Apex Court expecting the Tribunals/ High Courts to pass such orders and such orders when already passed by the Tribunals or High Courts, have in almost all the cases been upheld by the Apex Court, this Court is not inclined, and particularly in the facts and circumstances of the present case, to interfere with the impugned judgment and award. The appeal therefore, fails.

It is dismissed. The amount in deposit be paid to the respondents/ claimants with interest accrued thereon immediately.

20. In view of dismissal of the appeal, Civil Application No.8750/2019 stands disposed of.

**(R. G. AVACHAT)
JUDGE**

fmp/-