THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

FIRST APPEAL NO. 2102 of 2018

United India Assurance Company Ltd.
Through its Administrative Officer TP Hub,
Mahendra s/o Pratapsingh Virat,
Age : 50 yrs, Occ: Service,
R/o. Divisional Office-I,
United Indian Assurance Co., Ltd.
Osmanpura, Aurangabad. **… APPELLANT**
(Orig. Respondent No.4)

VERSUS

1. Kantabai w/o Dnyanoba Kamble
Age: 53 yrs, Occ. Household,
R/o. Lohara, Tq. Udgir,
Dist. Latur.

2. Gautam s/o Dnyanoba Kamble
Age: 37 yrs, Occ: Labourer,
R/o. As Above.

3. Siddharath s/o Dnyanoba Kamble
Age: 34 yrs, Occ: Labourer,
R/o. As Above.

4. Jyoti d/o Dnyanoba Kamble
Age: 27 yrs, Occ: Household,
R/o. As Above.

5. Dhondubai w/o Narsing Kamble
Age: 77 yrs, Occ: Nill,
R/o. As Above. **[Ori. Claimants]**

6. Sheshrao s/o Shankar Jadhav,
Age: Major, Occ: Driver,
R/o. Kumtha (kd) Tq. Udgir,
Dist. Latur. **… RESPONDENTS**

…

Mr. Swapnil S. Rathi, Advocate for Appellant.

Mr. Santosh B. Gastgar, Advocate for Respondent Nos.1 to 5.

None present for Respondent No.6 though served.

…

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

RESERVED ON : 16th February, 2022.

PRONOUNCED ON : 26th April, 2022.

ORDER :

. Heard finally with consent of both the sides at admission stage.

2 This appeal is directed against the impugned judgment and award passed in MACP No.39 of 2015 by the Member, MACT, Udgir.

3 The facts giving rise to this appeal in brief are as under:

i) The original claimants had filed claim petition under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the "Act" for the sake of convenience) and sought compensation of Rs.6,00,000/- on account of death of Dnyanoba (since deceased), who was travelling as an occupant of a private vehicle, a auto-rickshaw bearing registration No.MH-24-E-5601, which met with an accident and the deceased, who was occupant of the vehicle succumbed to injuries. The appellant/insurance company resisted the claim by raising the defence that the insurance policy of a auto-rickshaw which met with an accident has covered third-party risk only. The risk of the occupant is not covered under the policy. The Tribunal after considering the rival pleadings of the parties, evidence on record and the arguments advanced on behalf of both the sides, was pleased to allow the claim partly and awarded the compensation of Rs.5,77,000/- with interest at the rate of 9% per annum. Appellant was directed to satisfy the award first and then recover from owner of auto-rickshaw.

ii) Feeling aggrieved by the impugned judgment and award passed by the Tribunal, the appellant/ insurance company has preferred this appeal.

4 Heard Mr. Swapnil Rathi, learned counsel for the appellant/insurance company and Mr. Santosh Gastgar, learned counsel for the original claimants/respondent Nos.1 to 5. Respondent No.6 though served, remained absent.

5 Mr. Rathi, learned counsel for the appellant/insurance company vehemently submitted that deceased was travelling as an occupant/passenger in a rickshaw, which had policy of third-party. The risk of the occupant is not covered by the policy. He then contended that the owner of the vehicle was not made party to the proceedings before the Tribunal. He submitted that where the contract of insurance covered risk of third-party but not that of owner or occupant, the liability of the insurance company in a case of this nature cannot be extended to passenger/occupant of the motor vehicle unless the requisite amount of premium is paid for covering his risk.

6 Mr. Rathi has placed his reliance in case of ***Oriental Insurance Co. Ltd. Vs. Sudhakaran K. V. and Ors***, reported in, ***AIR 2008 Supreme Court 2729***. On the same issue, Mr. Rathi has placed his reliance on the following stock of citations:

a) ***New India Assurance Company Ltd. Vs. Babasaheb Anna Mali and others,*** reported in, ***AIR 2002 Bombay 27*** ;

b) ***The New India Assurance Company Ltd. Vs. Lilabai Shrimant Misal and others****, (First Appeal No.1638 of 2013) decided on 7th July, 2014 by this Court, Bench at Aurangabad*.

c) ***The New India Assurance Company Ltd. Vs. Gulabrao Nilkanth Ghumre and others****, (First Appeal No.2996 of 2013 with connected first appeals) decided on 17th January, 2017 by this Court, Bench at Aurangabad*.

7 Mr. Rathi, learned counsel for appellant, therefore, urged that the appeal may be allowed and the impugned award may be

modified and appellant/insurance company may be exonerated from the liability.

8 Mr. Santosh Gastgar, learned counsel for the original claimants supported the findings recorded by the Tribunal. He submitted that the risk of the occupant (deceased Dnyanoba) is covered by the insurance policy. The date of accident is covered by the insurance policy. The Tribunal has considered the defence raised by the insurance company and rightly turned down the same and passed the order of pay and recover. He, therefore, urged to dismiss the appeal.

9 I have considered the submissions of the learned counsel for both the sides. Perused the impugned judgment and award passed by the Member, MACT, Udgir, evidence on record and the policy of the rickshaw bearing registration No.MH-24-E-5601. It is very much necessary to examine insurance policy and terms and conditions of the rickshaw bearing registration No.MH-24-E-5601. On going through the copy of insurance policy vide Exhibit-47, it is evident that it is a Private Car Liability Only Policy for the vehicle bearing registration No.MH-24-E-5601 (rickshaw). The details of the premium of insurance are as under:

"CERTIFICATE OF INSURANCE
PRIVATE CAR – LIABILITY POLICY

SCHEDULE OF PREMIUM (IN ₹)		
B. Basic – TP	₹	1,129.00
Total	₹	1,129.00
Add:		
Compulsory PA for Owner Driver	₹	100.00
Employee Of Insured	₹	50.00
Sub Total (Additions)	₹	150.00
Gross TP(B)	₹	1,279.00
Total Liability Premium	₹	1,279.00

10 There is no dispute that the deceased was travelling in a auto-rickshaw bearing registration No.MH-24-E-5601 when met with an accident and succumbed to injuries. In order to find out the legal position, I have gone through the stock of citations relied upon by Mr. Rathi, learned counsel for appellant. In case of ***Oriental Insurance Co. Ltd. Vs. Sudhakaran K. V. and Ors*** (supra), it is held by the Honorable Supreme Court as under:

> "The legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehicle or the pillion rider. The pillion rider in a two wheeler was not to be treated as a third party when the

> accident has taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle."

11 In case of ***New India Assurance Company Ltd. Vs. Babasaheb Anna Mali and others*** (supra), it is held by this Court as under:

> "Under law the insurance policy of motor vehicle is not compulsorily required to cover passengers save and except where vehicle is a vehicle in which passengers are carried for hire or reward or by a reason of or in pursuance of contract of employment. The expression "third party" would not cover passenger or the pillion rider of a motor vehicle. The proposition that the expression "third party" is expression of wide import covering all persons except the insured and insurer is misconceived and cannot stand legality on face of proviso (ii) to S.95(1) which provides that insurance cover is not available to the passengers except where vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of contract of employment. Hence, in the instant case, the pillion rider of the motor cycle which was insured with the appellant was not covered under the policy of insurance which was admittedly third party policy. When the pillion rider of a motor cycle is not covered under the policy of insurance, obviously the insurer of the motor cycle could not have been saddled with the no fault liability under S.92-A even under the limited and restricted enquiry."

12 In case of ***The New India Assurance Company Ltd. Vs. Gulabrao Nilkanth Ghumre and others*** (supra), this Court after considering various decisions of the Apex Court has held that when policy covers the risk of third-party, the claimant travelling in the vehicle involved in the accident cannot be treated as third-party. No liability could be fasted on the appellant/insurer. It is observed by this Court that the appellant/insurer cannot be directed to pay and satisfy the award first and then recover it from the respondent/owner.

13 On going through the evidence of DW-1 for respondent No.2/insurance company, it is evident that the vehicle bearing registration No.MH-24-E-5601 is registered with R.T.O. as a private auto-rickshaw. In the private vehicle the deceased was travelling. It is further evident that auto-rickshaw was registered in the name of Jadhav Sheshrao Shankar/respondent No.6. Now the said rickshaw is registered in the name of Anil Murlidhar Gaikwad. Exhibit-46 is a licence of motorcycle, which is not permissible to drive auto-rickshaw. While facing cross-examination, witness Mr. Y. S. Patil, Assistant Motor Vehicle Inspector, admitted that in a private rickshaw friends, acquainted persons and relatives can be permitted to travel.

14 Even for the sake of moment argument is accepted that the deceased was travelling in a auto-rickshaw as a friend or relative, what about pleadings. There must be pleadings to that effect in the claim petition, which is foundation. It is no where stated in the claim petition that the deceased was travelling in a private auto-rickshaw as a friend of the owner or relative of the owner or employee of the owner. There is absolutely no pleadings to that effect. Certainly, it cannot be accepted that the deceased was travelling in a private auto-rickshaw as a friend or relative or employee of the owner.

15 Having considered the legal position referred above and looking to the terms and conditions of the insurance policy of the auto-rickshaw involved in the accident wherein deceased was travelling, his risk is not covered. The proposition of expression “third-party” does not cover the risk of the deceased, who was occupant of the auto-rickshaw in view of Section 147 of the Act. Certainly, the legal obligation arising under Section 147 of the Act cannot be extended to the legal heirs of the deceased, who was occupant of the private auto-rickshaw. The order of pay and recover passed by the Tribunal appears to be incorrect in the eyes of law. To that extent, the impugned award needs to be modified. The appellant/insurance company cannot be directed to pay the amount of compensation and

then recover it by way of execution proceedings when there is no contract of insurance.

16 It is also important to note that the recent owner of the private auto-rickshaw is also not made party to the claim petition, which was also necessary party.

17 Having regard to the above reasons and discussion, the appeal must succeed. Hence, the following order is passed:

O R D E R

I. The appeal stands allowed as under.

II. The impugned award passed in MACP No.39 of 2015 by the Member, MACT, Udgir, is hereby modified in following terms.

III. Respondent No.6 – Sheshrao s/o Shankar Jadhav shall be liable to pay compensation of Rs.5,77,000/- (Rupees Five Lakh and Seventy-Seven Thousand Only) (inclusive of NFL amount) with interest at the rate of 9% per annum from the date of petition till realization of entire amount to the claimants.

IV. Rest of the award stands confirmed.

V. The NFL amount paid by the insurance company to the claimants, if any, shall not be recovered from them.

VI. The appellant is entitled to get back the amount of compensation deposited in this Court. However, excluding amount of NFL of Rs.50,000/- (Rupees Fifty Thousand Only). The Registry to make payment accordingly to the appellant.

VII. No order as to costs.

VIII. Award be drawn accordingly.

IX. In view of disposal of first appeal, pending civil applications, if any, also stand disposed of.

X. R & P be sent back to the concerned Tribunal.

[SHRIKANT D. KULKARNI, J.]

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