

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

**FIRST APPEAL NO. 2281 OF 2015
WITH
CIVIL APPLICATION NO. 11184 OF 2015
WITH
CIVIL APPLICATION NO.4464 OF 2016**

The New India Assurance Co. Ltd. Through its Divisional Manager, Aurangabad Divisional Office, D.O.I., Above Mahesh Auto, Ajay Engineering Compound, Near Kranti Chowk, Adalat Road, Aurangabad.	.. Appellant [original opponent No.2]
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Versus

1. Waman s/o. Limbaji Waghmare Age.50 years, Occ. Service, R/o. Aurad Shahajani, Tq. Nilanga, Dist. Latur.	.. Respondents [R.No.1-ori. claimant No.1. R.No.2-Ori. opponent No.1]
2. Mahadeo s/o. Basanna Biradar Age. Major, Occ. Business/Vehicle owner, R/o. Deoni, Tq. Deoni, Dist. Latur.	

Mr.A.B. Gatane, Advocate for the appellant.
Mr.B.R. Kedar, Advocate for respondent No.1.

CORAM	:	VINAY JOSHI, J.
RESERVED ON	:	24.01.2022
PRONOUNCED ON	:	10.02.2022

J U D G M E N T :-

01. This is an appeal of the insurance company in

terms of section 173 of the Motors Vehicles Act, challenging the legality and propriety of the judgment and award dated 18.06.2015 passed by the learned Member of Motor Accident Claims Tribunal, Latur in MACP No.257 of 2010, thereby imposing joint and several liability on the insurance company by applying the principle of "pay and recover theory".

02. The facts in brief are such that the claimant Waman Waghmare sustained permanent disability in vehicular accident dated 03.12.2009 for which he has lodged a claim in terms of section 166 of the MV Act. It is the claimant's case that at the relevant time he was returning to village Aurad from Nilanga by tempo bearing registration No. MH-24-A-3024, after attending marriage ceremony. The tempo was driven in high speed as well as in rash and negligent manner. As a result of rash driving the tempo driver lost control and it turned turtle. The claimant sustained grievous bodily injury for which he was hospitalized. The disability was assessed

to the extent of 37%.

03. The claim was contested by the owner as well as insurance company. Besides usual denials, it is stand of the insurer that the claimant who was gratuitous passenger was not covered and therefore there was breach of terms and conditions of insurance policy. Hence, the insurance company is not liable. It is contended that though the Tribunal has accepted the plea that the claimant is not a third party, therefore not covered under the policy, had exonerated the insurance company, however, directed to pay the amount with liberty to recover from the owner.

04. The learned Counsel appearing for the claimant resisted on facts that the claimant was fare paying passenger. It is the submission that at the relevant time, the tempo was carrying marriage gifts and thus the claimant falls in the category of owner of goods and therefore he is covered by the policy. With the

assistance of both sides, evidence is carefully examined. Neither First Information Report nor any statement discloses that the claimant was travelling in the tempo as a custodian or owner of the goods received in the marriage. It emerges that after marriage, thirty persons were travelling by the tempo. The FIR is totally silent about existence of goods. Belated statement of claimant to that effect carries no substance. Therefore, the conclusion drawn by the Tribunal that the claimant was not the owner of goods is well justified. Admittedly, it was goods vehicle and therefore the claimant being gratuitous passenger, due to breach of terms and conditions of the policy, insurance company cannot be held liable.

05. The important question falls for consideration is whether the impugned directions about pay and recover would be justified. The learned Counsel appearing for insurance company strongly relied on the decision of the Supreme Court in case of New India Assurance Co. Ltd. Vs.

Asha Rani and Ors., (2003) 2 SCC 223 to contend that after change in relevant provision, the word "any person" does not include a third party and a person travelling as a gratuitous passenger in goods carriage is not covered by the policy. He would submit that after decision of the Supreme Court in the case of M/s. National Insurance Co. Ltd. Vs. Baljit Kaur and Ors., 2004 AIR SCW 212, the Supreme Court in above case of Asha Rani (supra) has held that gratuitous passenger is not covered. In this regard, he relied on the decision of United India Insurance Co. Ltd. Vs. Anubai Gopichand Thakare & Ors., 2008(1) Mh.L.J.73, wherein this Court after considering various decisions in the field, has concluded that a person who is not covered under the terms of the insurance policy, cannot be treated as third party i.e. gratuitous passenger cannot be regarded as third party. This Court also expressed that directions given by the Supreme Court issued in exercise of extraordinary jurisdiction under Article 142 of the Constitution cannot be treated as binding precedent. In order to substantiate

the same view, he also relied on the decision of this Court in the case of New India Assurance Co. Ltd. Vs. Puja Satish Gavali & Ors., (2019) 6 Bom CR 163, wherein another Single Judge of this Court on similar facts has completely exonerated insurance company. Moreover, on facts, to impress that the claimant who was a member of marriage party travelling in goods vehicle has to be treated as gratuitous passenger, reliance is placed on the decision in case of National Insurance Co. Vs. Rattani and Ors., (2009) 2 SCC 75.

06. It is strenuously argued that the learned Tribunal on appreciation of facts though exonerated the insurance company, however, it has wrongly directed to pay the amount and recover the same. According to him, it is evident that the claimant was travelling in the goods vehicle as a gratuitous passenger and therefore his risk was not covered under the policy. According to him, it would be unjust and improper to issue directions to the insurance company to satisfy the award.

07. On the other hand, the claimant's learned Counsel has submitted that having regard to the nature of beneficial legislation the Tribunal was right in issuing directions. He would submit that in various decision, the Supreme Court as well as this Court has considered the nature of litigation and issued directions to pay and recover the amount from the owner.

08. After considering the factual score, it is evident that the claimant was gratuitous passenger and was not covered by the policy. I have gone through the decisions cited by the respondents in cases of The New India Assurance Co. Ltd. Vs. Punjabai Bansi Solase & Ors., 2019(3) ALL MR 647 and United India Insurance Co. Ltd. Vs. Godabai w/o. Kisanrao Shinde & Ors., 2017(6) ALL MR 809, wherein this Court has considered the above reported judgments. However, keeping in view, the benevolent object of the Act and relevant factors, thought it appropriate to issue direction to the

insurance company to pay the awarded sum and recover from the owner of the offending vehicle. Reliance is also placed on the decision of the Supreme Court in the case of Shamanna and Anr. Vs. Divisional Manager Oriental Insurance Co. Ltd. & Ors., 2018 AIR (SC) 3726, wherein similar directions were issued by the Supreme Court. Pertinent to note that in the case of Manager, National Insurance Co. Ltd. Vs. Saju P. Paul and Anr., (2013) 2 SCC 41, the Supreme Court held that despite exoneration of insurance company from the liability to pay the compensation, directions can be issued to the insurance company to first pay the compensation and subsequently recover it from the owner of the offending vehicle. Consistently, this Court has held that the Tribunal is vest with the powers to issue pay and recover directions depending upon facts and circumstances of each case.

09. Herein the Tribunal has granted total compensation to the tune of Rs.1,26,591/- along with interest. So far as amount of compensation is concerned,

the assessment is well justified. The claimant had sustained rib fractures in the accident for which he was hospitalized for a considerable period. Already in appeal the entire awarded amount has been deposited by the company. Considering all these peculiar facts and particularly having regard to the nature of the litigation, no interference is called in the direction issued by the Tribunal directing the insurance company to pay the compensation first and recover it from the owner. In view of that, the appeal stands dismissed.

10. In view of disposal of first appeal, pending civil applications do not survive and stand disposed of.

[VINAY JOSHI,J.]