

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.52/2017

1. Shri Pankaj G. Naik,
Son of Gampu Naik,
Major in age,
r/o H. No. 111/3,
Bhamai, Pali, Goa.
(Driver of truck No. GA-04-T-1460):

2. Shri Samir G Naik,
Son of Gampu Naik,
Major in age,
r/o H. No. 111/3, ,
Bhamai, Pali, Goa
(Owner of Truck No. GA-04-T-1460)

...APPELLANTS

Versus

1. Smt. Ranjana R. Mandrekar,
W/o Raghuvir S. Mandrekar,
Major in age, widow, servant,
2. Kum. Rakhee R. M. Mandrekar.
d/o. Raghuvir S. Mandrekar, student,
major in age,

...RESPONDENTS

3. Kum. Shivani R. Mandrekar,
d/o. Raghuvir S. Mandrekar, student,
major in age,
4. Kum. Akash R. Mandrekar ,
s/o. Raghuvir S. Mandrekar, student,
minor, represented by natural mother
(R.no.1), above all r/o H. no. 1133,
Marvasada, Usgao, Ponda, Goa.

5. ICICI Lombard General Insurance
Company Ltd., Branch office at Panaji
Branch, Panaji Goa.

6. MD Istiyah Ansari
s/o. Islam Ansari, Since deceased
through Lrs.
Shri Islam Ansari, Major in age,
r/o. Dhanwar, Barsot, Barhic,
Hazaribag, Zharkhand.

7. Shri Ritesh S. Naik,
s/o. Suresh Naik,
Major in age,
r/o. H. No. 77/b,
Carapur, Bicholim, Goa,
(Owner of Truck No.GA-04-T-8962),

8. Bajaj Allianz General Insurance Co.
Branch Office at Margao, Goa.
(Insurer of Truck No. GA-04-T-8962)

**Mr. J. Godinho with Mr. Manoj Jalmi, Advocates for the
Appellants.**

**Mr. Sufian Sayed with Mr. J. Supekar, Advocates for
Respondents No.1 to 4.**

Mr. James Lopes, Advocate for Respondent No.5.

Mr. A. Naik, Advocate for Respondent No.8.

**WITH
FIRST APPEAL NO.53/2017**

1. Shri Pankaj G. Naik,
Son of Gampu Naik,
Major in age,
r/o H. No. 111/3,
Bhamai, Pali, Goa.
(Driver of truck No. GA-04-T-1460)

2. Shri Samir G Naik,
Son of Gampu Naik,
Major in age, r/o H. No. 111/3,
Bhamai, Pali, Goa
(Owner of Truck No.
GA-04-T-1460)

...APPELLANTS

Versus

1. Shri Mahabaleshwar C. Dessai,
S/o Channappa Dessai,
Major in age, Married, service.

2. Mrs. Kalpana M. Dessai,
w/o. Mahabaleshwar Dessai,
Major in age, Married, housewife,
Both the r/o. H. No. 11/2,
Gauthan Khandepar,
Ponda, Goa.

3. ICICI Lombard General Insurance
Company Ltd., Branch office at
Panaji Branch, Panaji Goa.

4. MD Istiyah Ansari
s/o. Islam Ansari, Since deceased
through Lrs.
Shri Islam Ansari, major in age,
r/o. Dhanwar, Barsot, Barhic,
Hazaribag, Zharkhand.

5. Shri Ritesh S. Naik,
s/o. Suresh Naik, major in age,
r/o. H. No. 77/b,
Carapur, Bicholim, Goa,
(Owner of Truck No.GA-04-T-8962),

6. Bajaj Allianz General Insurance Co.
Branch Office at Margao, Goa.
(Insurer of Truck No. GA-04-T-8962 ...RESPONDENTS

Mr. J. Godinho with **Mr. Manoj Jalmi**, *Advocates for the Appellants.*

Mr. Sufian Sayed with **Mr. J. Supekar**, *Advocates for Respondent No.2.*

Mr. James Lopes, *Advocate for Respondent No.3.*

Mr. A. Naik, *Advocate for Respondent No.6.*

CORAM: M. S. SONAK, J.

DATED: 11th March 2022

ORAL JUDGMENT:

1. Heard learned counsel for the parties.
2. Learned counsel for the parties agree that both these appeals can be disposed of by a common judgment and order as the appeals concern claims which arise from the same accident that took place on 16.03.2010 in which Girish Mandrekar and Nagraj Desai died. The First Appeal No.52/2017 concerns the Claim Petition instituted by the dependents of late Girish Mandrekar and First Appeal No.53/2017 concerns the Claim Petition instituted by the dependents of late Nagraj Desai. Therefore, it is only proper that both these appeals are considered and disposed of by a common judgment and order.
3. The Motor Accident Claims Tribunal, at Panaji (Tribunal) by the impugned judgment and award dated 29.11.2016 made in the respective claim petitions has held that the dependents of

Girish Mandrekar are entitled to compensation of ₹9,54,000/- and the dependents of Nagraj Desai are entitled to compensation of ₹7 lakhs. However, the Tribunal exonerated ICICI Lombard General Insurance Company Limited (Insurance Company) and foisted the entire liability of payment of this compensation upon the appellants i.e. Pankaj Naik (driver of the truck) and Samir Naik (owner of the truck). Hence these appeals by Pankaj and Samir.

4. Mr. Godinho, learned counsel for the appellants submits that in this case Girish Mandrekar and Nagraj Desai were pedestrians and not the occupants of the truck and therefore there was no question of exonerating the insurance company. Without prejudice, he submitted that even if it is held that Girish Mandrekar and Nagraj Desai were the occupants of the truck, the truck was insured under a comprehensive policy and therefore the insurance company was bound to indemnify the appellants. Finally, Mr. Godinho submitted the determination of the quantum of compensation is not in accord with the ruling of the Supreme Court in the case of *National Insurance Co. v. Pranay Sethi – (2017) 16 SCC 680*. Mr. Godinho relied on *National Insurance Co. Ltd. v. Balkrishna & Anr. – (2013) 1 SCC 731* in support of his submissions.

5. Mr. James Lopes, learned counsel for the insurance company submits that the insurance policy produced on record by the appellants at Exh.63 does not even remotely cover the liability for gratuitous passengers. He submits that the appellants had themselves contended that Girish and Nagraj were not their employees. He, therefore, submits that there was no error whatsoever in the exoneration of the insurance company. He relies on *Begumbai Ramdas Torde & Ors. v. Oriental Insurance Co. Ltd. & Ors. in First Appeal No.400/2002 decided by learned Single Judge of this Court (Aurangabad Bench) on 04.04.2016* and *New India Assurance Co.Ltd. v. Asha Rani & Ors. - in Appeal (Civil) 5385 of 2001 dated 17.08.2001* in support of his submissions.

6. Mr. Sufiyan Sayed, learned counsel for the claimants submits that it was the case of the claimants that Girish was a cleaner and Nagraj was a mechanic. He submits that in any case this was a fit case for making a 'pay and recover' order because the claimants without being at fault have been deprived of the compensation in an accident that took place on 16.03.2010. He relied on *Manuara Khatun v. Rajesh Kr. Singh – AIR 2017 SC 1204*, *Anu Bhanvara & Ors. v. Iffco Tokio General Insurance Company Limited & Ors. - CDJ 2019 SC 900* and *Jayant K. Naroji v. Smt. Shubhangi Santosh Naik & Ors. in*

First Appeal No.2/2013 decided on 19.01.2022 in support of the principle of pay and recovery.

7. Mr. Sufiyan Sayed also contended that the compensation determined by the Tribunal was in accord with the law as it prevailed at the time of the decision and therefore, at this point of time the determination may not be interfered with.

8. Mr. Sufiyan Sayed pointed out that in First Appeal no.53/2017 respondent no. 1 has since expired. He also pointed out that respondent no. 2, his wife is already on record.

9. At this stage, there is no question of adjourning the matter for bringing on record the legal representatives of deceased respondent no.1, because respondent no. 2, his wife is already on record. Besides in such a matter, the issue is of dependency. The son of respondent no. 1 was not a dependent at the time of the institution of the claim petition and will therefore not be a dependent at this stage as well. Mr. Sufiyan Sayed states that the entire compensation can be paid to respondent no. 2, the mother of Nagraj. This statement is accepted.

10. The rival contentions now fall for my determination.

11. In this case, there is no evidence whatsoever that Girish and Nagraj were pedestrians and not the occupants of the truck bearing registration no.GA-04-T-1460 of which the first appellant was the driver and the second appellant the owner. Rather, the evidence on record overwhelmingly established that Girish and Nagraj were the occupants of the said truck that was responsible for the accident and in which the said two persons lost their lives. Therefore, the finding recorded by the Tribunal on this aspect warrants no interference.

12. The next issue is whether the insurance policy in respect of the said truck covers liability for the claims arising out of the death of Girish and Nagraj. Mr. Godinho pointed out to the deposition of Gauri Borkar the authorized representative for the insurance company in which she stated that the policy issued was comprehensive.

13. Now in terms of the law laid down in *Balkrishna & Anr. (supra)*, the mere nomenclature of a policy is never sufficient but it is necessary to analyze the terms and conditions of the insurance policy itself. The insurance policy in question has been produced on record by the appellants as Exh.63. The insurance policy makes specific provisions concerning the limits of liability and the limitations as to use.

14. The clause concerning the limits of liability reads as follows:

“(a) Under Section II – 1(i) of the policy a death of bodily injury: Such amount as is necessary to meet the requirements of the Motor Vehicles Act, 1988. Under Section II-1(ii) of the policy a damage to third party property Rs.750,000.00; PA cover for owner-driver under Section III: CSI Rs.200,000.00; Voluntary deductible; Rs.0.00.”

15. The clause concerning limitations as to use reads as follows:

“Use only for damage of goods within the meaning of the Motor Vehicle Act, 1988. The policy does not cover I) Use for organised racing, Pace making Reliability trials or speed testing. 2) Use whilst drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle. 3) Use for carrying passengers in the vehicle except employees (other than the driver) not exceeding the number permitted in the registration document and coming under the purview of Workmen’s Compensation Act, 1923.”

16. Based on the aforesaid the Tribunal has quite correctly concluded that the insurance policy did not cover any gratuitous passengers in the truck. Though the claimants had pleaded that Girish and Nagraj were cleaner and mechanic respectively, this position was denied by the appellants who asserted that Girish and Nagraj were not the employees of appellant no.2 (owner). The Tribunal has correctly analyzed the terms of the insurance

policy and held that the insurance policy did not cover gratuitous passengers like Girish and Nagraj and based thereon exonerated the insurance company.

17. The Tribunal in this case, however, failed to appreciate that there was no point in depriving the claimants of the compensation due and payable to them simply because of certain issues as between the owner of the truck on one hand and the insurance company on the other. In almost identical circumstances, in the case of *Manuara Khatun (supra)*, the Hon'ble Supreme Court made a pay and recovery order i.e. issued directions to the insurance company to pay the compensation to the claimants and thereafter granted the insurance company the liberty to recover the same from the owner for breach of the insurance policy. That was also a case where the Court was concerned with the situation where gratuitous passengers were carried in the offending vehicle.

18. The discussion on the above issue is to be found in paragraphs 14 to 20 which read as follows:-

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.

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.

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© 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).”

18) The facts of the case at hand are somewhat identical to the facts of the case mentioned supra because here also we find that the deceased were found travelling as “gratuitous passengers” in the offending vehicle and it was for this reason, the insurance companies were exonerated. In Saju P. Paul’s case (supra) also having held that the victim was “gratuitous passenger”, this Court issued directions against the Insurer of the offending vehicle to first satisfy the awarded sum and then to recover the same from the Insured in the same proceedings.

19) Learned counsel for respondent No. 3 (United India Insurance Company Ltd.), however, contended that the facts of the case at hand are not identical to the one involved in the case of Saju P. Paul (supra) and hence the law laid down therein cannot be applied to the facts of the case at hand. Learned counsel pointed out that firstly, the awarded compensation in this case is quite substantial and secondly, it is not yet paid to the claimants. Learned counsel also submitted that since the question involved herein is referred to a larger Bench and hence this Court should not give such directions, as prayed by the appellants, against the Insurance Company.

20) We find no merit in any of the submissions. Firstly, as mentioned above, we find marked similarity in the facts of this case and the one involved in Saju P. Paul’s Case (supra). Secondly, merely because the compensation has not yet been paid to the claimants though the case is quite old (16 years) like the one in Saju P. Paul’s Case (supra), it cannot

be a ground to deny the claimants the relief claimed in these appeals. Thirdly, this Court has already considered and rejected the argument regarding not granting of the relief of the nature claimed herein due to pendency of the reference to a larger Bench as would be clear from Para 26 of the judgment in Saju P. Paul's case (supra). That apart, learned counsel for the appellants stated at the bar that the reference made to the larger Bench has since been disposed of by keeping the issue undecided. It is for this reason also, the argument does not survive any more."

19. A similar view was also taken in *Anu Bhanvara (supra)* after following the ruling in *Manuara Khatun (supra)* and *Jayant Naroji (supra)*. In the latter case, there was a dispute of the precise terms of the insurance policy and therefore the matter was remanded to the Tribunal for fresh consideration. However, this Court held that the remand need not prolong the claimant's quest for compensation. Accordingly, the insurance company was directed to pay the compensation and thereafter depending upon the order of the Tribunal about the coverage, to recover the same from the owner.

20. Mr. Sufiyan Sayed is therefore justified in contending that whatever the disputes between the owners and the insurance company, this is a fit case for making pay and recover order in terms of the law laid down and discussed in *Manuara Khatun (supra)*.

21. Now on the issue of determination of compensation, reference is necessary to the positions in First Appeal No.52/2017 and First Appeal No. 53/2017 separately.

22. In First Appeal 52/2017, almost four dependants of Girish Mandrekar had sought compensation to the tune of Rs. 7 lakhs on account of the demise of Girish due to the injuries sustained by him in the vehicular accident involving the truck in question. The Tribunal has taken the notional income of Girish at Rs.3,000/- and thereafter made an addition of 50% towards future prospects. Girish's age was incorrectly taken at 21 years when in fact the evidence indicates that he was about 18 or 19 years old at the time of the accident. However, this does not make any difference because the correct multiplier of 18 was adopted.

23. The Tribunal in this case made a deduction of 25% towards personal expenses that Girish would have incurred. However, Mr. Lopes correctly pointed out that this deduction should have been 50% since Girish was admittedly a bachelor. After making this deduction the annual dependency amount would come to ₹27,000/- since Girish's notional income was taken at ₹3,000/- per month. The compensation towards dependency would then come to ₹4.86 lakhs after applying the multiplier of 18.

24. Towards the funeral expenses and loss of estate, Girish's dependents would be entitled to ₹30,000/-. Towards loss of consortium, each of the claimants would be entitled to ₹40,000/- i.e. a total of ₹1,60,000/-. All this is consistent with the law laid down in *Pranay Sethi (supra)*. The total compensation in First Appeal No. 52/2017 will have to be worked out as ₹6.76 lakhs. On this amount, the claimants would be entitled to interest @ 9% p.a. from the date of filing of the petition till the actual payment of this amount. First Appeal No. 52/2017 will have to be partly allowed to the aforesaid extent.

25. In First Appeal No. 53/2017, based on similar calculations the dependents of late Nagraj will have to be awarded compensation of ₹5.96 lakhs. This will also carry interest @ 9% p.a. from the date of filing of the petition till the actual payment of this amount. The difference in the amounts of compensation in the two appeals is because in First Appeal No.52/2017 the deceased Girish left behind four dependents and in First Appeal No.53/2017 deceased Nagraj left behind two dependents.

26. Both the appeals are now disposed of by making the following order:

a) The impugned Awards in both these appeals are modified and the compensation amount in First Appeal No. 52/2017 is reduced to ₹6.76 lakhs and in First Appeal No. 53/2017 the same is reduced to ₹5.96 lakhs;

b) The aforesaid amounts will carry interest @ 9% p.a. from the date of filing of the respective claim petitions till the actual payment;

c) Though, the primary liability for payment of compensation will be on the appellants herein i.e. the owner and the driver of the truck, the insurance company i.e. ICICI Lombard General Insurance Company is directed to first pay the compensation amount together with interest as above determined to the **claimants i.e. respondent nos.1 to 4 in First Appeal No.52/2017 and respondent no.2 in First Appeal No.53/2017**, within two months from today with liberty to thereafter recover the same from the appellants hearing by taking out appropriate proceedings, including execution proceedings;

d) The insurance company must deposit the aforesaid amounts in this court within two months from today. Upon deposit, the claimants will be entitled to withdraw

the same by furnishing proper identification and bank details. The Registry to ensure that the amounts are directly deposited in the bank accounts of the claimants;

e) Both the appeals are partly allowed to the aforesaid extent only;

f) There shall be no order for costs;

M. S. SONAK, J.

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