

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 26 OF 2004

United India Insurance Co. Ltd., Dhule
Through it's Divisional Manager and
Authorised Representative & Signatory,
Jalgaon Divisional Office, Mansing
Market, 2nd Floor, Near Railway Station,
District Jalgaon

Appellant
(original opp No.3)

Versus

1. Santosh Narayan Mali
Age : 45 years, occ : labour
2. Haribai Santosh Mali
Age : 39 years, occ : nil
3. Bhila Barku Borse
Age : 28 years, occ : driver
4. Bhika Manik Shirsath
(Since died through LR
Bhatu Bhika Shirsath
Age : 31 years, R/o Chougaon,
Taluka and District Dhule

Respondents
(Resp Nos.1 & 2 –
original claimants and
Resp Nos.3 & 4 – Ori.
Opp. Nos.1 & 2)

WITH
FIRST APPEAL NO. 646 OF 2007

United India Insurance Co. Ltd., Dhule
Through it's Divisional Manager and
Authorised Representative & Signatory,
Jalgaon Divisional Office, Mansing
Market, 2nd Floor, Near Railway Station,
District Jalgaon

Appellant
(original opp No.3)

Versus

1. Ashok Baburao Ahire
Age : 30 years, occ : labour
R/o Chaugaon, Taluka and
District Dhule
2. Bhila Barku Borse
Age : 28 years, occ : driver
3. Bhika Manik Shirsath
(Since died through LR
Bhatu Bhika Shirsath
Age : 31 years, R/o Chougaon,
Taluka and District Dhule

Respondents

(Resp No.1– original
claimant and Resp.
Nos.2 & 3 – Original
Opp. Nos.1 & 2)

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Mr. A.B. Gatne, Advocate for the appellant.
Mr. Mohit Shah, Advocate holding for Mr. S.P. Brahme,
Advocate for respondent Nos.1 and 2 in FA No.26/2004.
Mr. C.R. Deshpande, Advocate for respondent No.1 in
FA No. 646/2007.
Mr. Rajesh R. Patil, Advocate for owner and driver.

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CORAM : **SANDIPKUMAR C. MORE, J.**Judgment Reserved on : 24th January 2023Judgment pronounced on : 15th February 2023**Judgment:**

1. The appellant - Insurance Company in both these appeals has challenged the impugned judgments and awards dated 21.06.2003 and 09.05.2003 in respect of Motor Accident Claim Petition Nos. 261/1996 and 571/1996 passed by the learned Member, Motor Accident Claims Tribunal, Dhule (hereinafter referred to as “the learned Tribunal”) only

on the ground that the deceased as well as injured in both these claim petitions were not covered under the insurance policy, being labourers.

2. Since both these claim petitions and appeals thereof are arising out of one and the same accident, I have taken both these appeals for disposal with common judgment. M.A.C.P. No. 261/1996 is arising out of death of one Vitthal Santosh Mali whereas M.A.C.P. No. 571/1996 is in respect of injured person Ashok Baburao Ahire.

3. For the sake of convenience I have referred the deceased and injured by their names. The record shows that on 19.11.1995 at about 9.00 a.m. deceased Vitthal Santosh Mali and injured Ashok Baburao Ahire had gone to collect fodder in the trolley attached to a tractor involved in the accident alongwith co-labourers. However, since the driver of tractor bearing registration No. MH-18-7436 and trolley bearing registration No. MH-18-8803 namely Bhila Barku Borse i.e. the present respondent No.3 drove the tractor negligently, the aforesaid deceased and injured fell down from the trolley and sustained injuries. The learned Tribunal has granted compensation of Rs. 1,75,000/- inclusive of the amount of Rs. 50,000/- under "no fault liability" to the

parents of deceased Vitthal in M.A.C.P. No. 261/1996 whereas the injured claimant Ashok in M.A.C.P. No. 571/1996 was awarded with compensation of Rs. 50,000/-. So far as the quantum of compensation is concerned in both the appeals, there is no dispute in respect of the same, raised by the appellant Insurance Company. The main question involved in these appeals is that whether the deceased or injured were covered under the insurance policy of the aforesaid tractor and trolley.

4. The learned Counsel for the appellant – Insurance Company submits that the insurance policy (Exh.35) had covered the risk of driver, third party property damage and the risk of third party only. Thus, the same had not covered the risk of gratuitous passengers or labourers. In support of his submission, he relied on various judgments as follows :

- (i) New India Assurance Co. Ltd. vs Diwakar Daulatrao Rohankar and others, 2005 (4) Mh.L.J. 773*
- (ii) United India Insurance Co. Ltd. vs Anubai Gopichand Thakare and others, 2018 (1) Mh.L.J. 73*
- (iii) Chandrakant vs Majlasbai, (2018) Bom CR 681*

5. On the contrary, the learned Counsel for the respective claimants supported the judgments passed by the learned Tribunal and contended that the deceased and

injured were covered under the policy at Exh.35 since third party risk cover premium was accepted by the Insurance Company. He relied on the judgment in the case of ***New India Assurance Co. Ltd. vs Baby Nanda Devidas Salunke and another*** reported in ***2016 (4) Bom. C.R. 665***.

6. With the assistance of rival learned Counsel, I have gone through the impugned judgments and also the record and proceeding in respect of M.A.C.P. No. 261/1996.

7. It is significant to note that the quantum of compensation in both these cases are not disputed. What is disputed, is the nature of insurance policy. According to the appellant - Insurance Company, the risk of deceased and injured claimant was not covered under the said policy, whereas the claimants in both these appeals are claiming that they were squarely covered. It is important to note that according to the learned counsel for the Insurance Company, the injured and deceased were sitting on the mudguard of the tractor, and therefore, they are not covered under the policy since no person except the driver was allowed on the tractor involved in the accident. He also relied on the judgment of this Court in the case of ***New India Assurance Co. Ltd. vs Diwakar Daulatrao Rohankar*** (supra) wherein it is specifically

observed that the deceased sitting on the mudguard of the tractor died in the accident and since the said tractor was goods carrier, the Insurance Company was not statutorily required to insure the passengers travelling in such vehicle, and therefore, would not be liable to pay compensation. However, in the instant case the F.I.R. on record clearly indicates that the co-labourer alongwith the deceased and injured had stated that they alongwith deceased and injured were travelling in the trolley bearing registration No. MH-18-8803 attached to the tractor bearing registration No. MH-18-7436 and at the time of accident the deceased Vitthal as well as injured Ashok had in fact fell on road from the trolley itself. Further, the appellant Insurance Company itself in it's written statement has admitted that the deceased and injured fell from trolley itself. As such, the learned Counsel for the Insurance Company cannot submit contrary to the facts on record that deceased Vitthal was sitting on the mudguard of the tractor. Thus, such submission needs to be discarded alongwith the judgment cited on this aspect.

8. The learned Tribunal has negated the submission made on behalf of the Insurance Company that the injured and deceased being gratuitous passengers /

labourers were not covered under the policy (Exh.35) since no premium was paid to cover their risk. On perusal of the impugned judgments, it appears that the learned Tribunal has negated submission of the Insurance Company that the injured and deceased were gratuitous passengers. It further appears that the learned Tribunal has granted compensation by holding that the injured and deceased were third parties, and therefore, their risk was covered. Admittedly, under the insurance policy (Exh.35) the risk of third party was covered. However, the crucial question in these matters is that whether the deceased and injured were third parties. The police papers on record clearly indicate that the deceased and injured were labours of owner of tractor and trolley and they were going to collect fodder. Thus, they cannot be called as 'gratuitous passengers'. However, the policy (Exh.35) on record indicates that only the risks of third party, driver and damage to third party property were covered under the said policy. The appellant – Insurance Company has examined its officer Mahesh Hanumanprasad Tiwari i.e. Branch Manager, at Exh. 34 and he has stated so. He has also stated that under the policy (Exh.35) they had not covered the risk of labourers, coolies or cleaner and no premium for such risk was taken. Though this witness, in cross-examination, has

admitted the nature of said policy as a comprehensive policy, but subsequently clarified that the risk of deceased Vitthal or injured Ashok was not covered.

9. It is significant to note that the deceased Vitthal and injured Ashok were travelling in the trolley itself, and therefore, they cannot be treated as third parties. Further, it is also brought on record that they were travelling in the tractor trolley being the workers of the owner of tractor. Moreover, the evidence of Branch Manager of appellant Insurance Company clearly indicates that risk of labourers was not covered under the said policy. Thus, it can safely be inferred that the learned Tribunal erred in holding that the deceased Vitthal and injured Ashok were third parties and therefore, covered under the policy. On the contrary, it has been transpired that no premium for covering the risk of deceased and injured being labourers, was received and therefore, it cannot be said that their risk was covered.

10. However, this Court in the case of *United India Insurance Company Limited vs. Karbhari Gangadhar Bodkhe and others* and also *Atmaram Sukhdev Thorat vs. Karbhari Gangadhar Bodkhe and others*, reported in *MANU/MH/2966/2022*, has considered various judgments of

the Hon'ble Apex Court on the aspect of pay and recover. It is specifically observed in para 15 as thus :

*"15. On the contrary, learned Counsel for the original claimants also relied on the judgments of the Hon'ble Supreme Court in the cases of **Manura Khatun vs. Rajesh Kr. Singh** and **Anu Bhanvara vs Iffco Tokio General Insurance Co.Ltd.** (supra) and submitted that though the policy involved in those cases was not supposed to cover the risk of the victims therein, but the Hon'ble Supreme Court, after exonerating the Insurance Company from such liability, had directed it to satisfy the award first and then to recover the same from the owner.*

*In the case of **Manura Khatun vs. Rajesh Kr. Singh** (supra), the Hon'ble Apex Court has made the following observation in para Nos. 14, 15, 16 and 17 :*

- 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 (C) 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)."

Further, in the case of **Anu Bhanvara vs Iffco Tokio General Insurance Co.Ltd.** (supra) also the Hon'ble Apex Court has taken similar view of pay and recover, especially when the victims being gratuitous passengers in the case vehicle was not covered under the insurance policy. It is specifically observed in that judgment in para Nos.11 and 12 as follows :

- 11. 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.*

12. Accordingly, these appeals are disposed of with the direction that the respondent no.1 – insurance company shall be liable to pay the awarded compensation to the claimants in both the appeals. However, respondent no.1 – insurance company shall have the right to realize the said amount of compensation from the respondents no. 2 and 3 (driver and owner of the vehicle) in accordance with law”.

11. As such, on going through the aforesaid observations of the Hon’ble Apex Court, it is evident that considering the peculiar facts of each case, the principle of ‘pay and recover’ can be invoked even though it is found that the Insurance Company is not liable to pay the compensation in view of breach of policy conditions.

12. The learned Counsel for the respondents-claimants in these appeals relied on the judgment in the case of *New India Assurance Co. Ltd. vs Baby Nanda Devidas Salunke* (supra) wherein it is held that Insurance Company is liable to pay compensation to the owner of goods, his representatives and also gratuitous passengers travelling in goods vehicle because such persons need to be treated as third party. However, this observation appears to be based on the view taken by the Hon’ble Apex Court in the cases of *New India Assurance Co. Ltd. Vs Satpal Singh and others, 2000 (1) SCC 237* and *Ramesh Kumar vs National Insurance Co.*

Ltd. and others, 2001 (6) SCC 713. But this Court in the case of *United India Insurance Co. Ltd. Vs Anubai Gopichand Thakre* (supra), relied upon by the Insurance Company, as mentioned above, has also observed that expression “third party” means a person not covered under the terms of insurance policy. It is also held in the said judgment that gratuitous passenger cannot be regarded as third party. It appears that in the judgment relied upon by the respondents – claimants, a reference of *Satpal Singh’s* case is given. However, in the subsequent judgment in case of *New India Assurance Co. Ltd. Vs Asha Rani, 2003 (3) Bom.C.R. 765*, the ratio laid down in *Satpal Singh’s* case is held as not good law. Therefore, the judgment relied by the respondents – claimants is not helpful in the present case.

13. Thus, what has emerged that the risk of injured and deceased was not covered under the insurance policy at Exh.35 in the instant matters. However, it has come on record that the accident has taken place long back in the year 1995. Further, the Insurance Company has also deposited amounts of compensation in these matters which are also withdrawn by the respective claimants. The claimants in these appeals belong to poor class, and therefore, considering

the peculiar circumstances of these cases and in view of the observation of the Hon'ble Apex Court in the case of ***Anu Bhanvara vs Iffco Tokio General Insurance Co. Ltd. (supra)***, a direction to satisfy the awards needs to be given to the appellant Insurance Company though it is not liable to pay the compensation in the instant matters. To safeguard the interest of Insurance Company, a liberty can be granted to it to recover the amount of compensation from the driver and owner of the offending tractor and trolley who are the present respondent Nos.1 and 2. In the result, following order is passed.

ORDER

- (i) The appeals are hereby partly allowed.
- (ii) The appellant – Insurance Company is exonerated from the liability of paying compensation to the respondents – claimants in both the appeals. However, the appellant – Insurance Company appears to have satisfied the impugned awards by paying the compensation as awarded by the learned Tribunal. Thus, the appellant - Insurance Company is at liberty to recover the entire amounts of compensation from respondent No.1 driver and respondent No.2 i.e. the legal representative of the owner of offending

tractor bearing registration MH-18-7436 and
trolley bearing registration No. MH-18-8803.

(iii) The award be modified and drawn accordingly.

(iv) The appeal is disposed of.

(SANDIPKUMAR C. MORE, J.)