

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

FIRST APPEAL NO.988 OF 2006

The Oriental Insurance Co. Ltd.,
Branch : Dhule

.... APPELLANT
(Orig. Respondent No.2)

VERSUS

1. Mangalabai Yogendrasing Girase,
Age : 28 years, Occu.: Household
2. Tumbadusing Dalesing Girase,
(Died. Through L.Rs. Respondent Nos.1 & 4)
3. Gulabkaurbai Dalesing Girase,
(Died. Through L.Rs. Respondent Nos.1 & 4)
4. Bhatabai ogendrasing Girase,
Age : 2 months, No.4 being minor
through her guardian mother
Respondent No.1.
All R/o.: War, Tq. & District Dhule.
.... (Respondent Nos.1 to 4
are Orig. claimant Nos.1 to 4)
5. Bhimsing Gumansing Girase,
Age : Adult, Occu.: Driver,
and owner of Motorcycle
No. MH-19-B-6815, Since deceased
through his heir :
- 5A) Ramanbai Bhimsing Girase
Age : Adult, Occu.: Household work,
R/o.: War, Tq. and District : Dhule Respondent Nos.5 & 5A
are Original Respondent
Nos.1 and 1A.
... RESPONDENTS

.....

Advocate for Appellant : Mr. U. S. Malte
Advocate for Respondent Nos.1 to 4 : Mr. Mukul Kulkarni
Advocate for Respondent No.5A : Mr. S. R. Kedar h/f
Mr. Pradeep R. Patil

....

CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 31/01/2023

PRONOUNCED ON : 03/02/2023

....

JUDGMENT :

1. The appellant - insurance company, who is original respondent No.2 in MACP No.689 of 2001, has challenged the judgment and award dated 27/03/2006 passed by the Motor Accident Claims Tribunal, Dhule (hereinafter referred to as 'the learned Tribunal') in the aforesaid claim petition. However, during pendency of this appeal the learned counsel for the appellants produced pursis alongwith death certificates of respondent Nos.2 & 3. On perusal of those death certificates it is revealed that respondent Nos.2 & 3 died during pendency of this appeal. As such, their names were deleted under the order dated 31/01/2023 since the other dependents of the deceased are already on record.

2. On 14/01/2001, one Bhimsing while riding his motorcycle bearing Registration No. MH-18-B-6815, gave dash to a Neem tree. At that time there were two pillion riders on the said motorcycle. Out of those three persons, Bhimsing and one of the pillion riders Yogendrasing died in the said accident. It is not disputed that the aforesaid motorcycle was insured with the present appellant - insurance company for the period from 13/12/2000 to 12/12/2001 covering the date of accident. The respondent Nos.1 to 4, who are the original claimants, filed the aforesaid accident claim petition being the legal representatives of the deceased Yogendrasing. The learned Tribunal after conducting the trial, granted compensation of Rs.2,89,000/- alongwith interest @ 7.5%

p.a. from the date of petition till its realization. As such, the appellant - insurance company has filed this appeal challenging the impugned judgment and award on following grounds :

- a) The liability of the deceased being the pillion was not at all covered under the policy, which was an 'act only' policy and no premium was paid to cover the risk of the pillion rider.
- b) Income of the deceased was considered at higher side despite there being any evidence to that effect.

3. The learned counsel for the appellant - insurance company submits that the policy of the offending motorcycle was 'act only' policy, which did not cover the risk of owner as well as pillion rider. The cover was only in respect of third party but despite, the learned Tribunal held the insurance company liable for paying the compensation. He pointed out that there were three persons on the motorcycle when it hit a Neem tree and on that count also there was a breach of policy terms. He pointed out that the learned Tribunal should have considered the notional income of Rs.15,000 p.a. of the deceased, specially when there was no documentary proof in respect of his actual income. Thus, he prayed for total exoneration of the appellant - insurance company from the liability of paying compensation.

4. On the contrary, the learned counsel for respondent Nos.1 to 4 claimants supported the impugned judgment, but in alternative also submitted that if it is held that the deceased was not covered under the policy of the motorcycle involved in the accident, then at

least pay and recover order be passed considering the fact that the larger part of the compensation has already been withdrawn by the claimants long back.

5. The learned counsel for respondent No.5A i.e. the legal representatives of owner of the offending motorcycle also supported the judgment of learned Tribunal and requested to maintain the same as it is.

6. It is significant to note that the learned Tribunal has considered notional income of the deceased to the extent of Rs.3,000/- per month being an agriculturist. Though for such observation, the exception is taken by the learned counsel for the appellant - insurance company, but considering the date of accident being in the year 2001, the aforesaid notional income appears appropriate since the deceased was in the age group of 30 to 35 years. Therefore, the submission of the learned counsel for the appellant - insurance company as regards income of the deceased appears baseless.

7. Now, let us come to the most crucial question involved in this appeal. It is vehemently argued by the learned counsel for the appellant - insurance company that the policy under which the motorcycle involved in the accident insured, was in fact an 'act only' policy and not a comprehensive policy. Further, there was no premium paid to cover the risk of owner as well as the pillion rider and it had covered only the risk of third party. To support his contention, the learned counsel for the appellant - insurance company strongly relied upon the judgment of Hon'ble Apex Court

reported in *(2008) 7 SCC 428 in the case of Oriental Insurance Company Limited vs. Sudhakaran K. V. and others.*

The facts of the aforesaid case indicate that the deceased was travelling as a pillion rider on a Scooter and she failed down from the Scooter and succumbed to the injuries sustained by her. In the aforesaid background, the Hon'ble Apex Court has held that the policy involved in the case, was confined to only third party risk and therefore, the appellant - insurance company was not liable to pay any compensation to the legal representatives of the deceased. While discussing this aspect, the Hon'ble Apex Court has held as follows :

"A gratuitous passenger in a goods carriage would not be covered by a contract of insurance entered into by and between the insurer and the owner of the vehicle in terms of Section 147 of the Act. Tilak Singh Case, (2003) 2 SCC 223, extended the said principle to all other categories of vehicles. In Tilak Singh case, on facts it was held that the Insurance Company concerned owed no liability towards the injuries suffered by the deceased who was a pillion -rider, as the insurance policy was a statutory policy, and herence it did not cover the risk of death of or bodily injury to a gratuitous passenger.

.....(Paras 17 & 18)

The law applicable in cases such as the present is that : (i) the liability of the insurance company is not extended to a pillion - rider of the motor vehicle unless the requisite amount of premium is paid for covering his / her risk; (ii) the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehilce or the pillion-rider; (iii) the pillion - rider in a two-wheeler is

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.

...(Para 25)

In the present case the contract of insurance was entered into for the purpose of covering the third-party risk and not the risk of the owner or a pillion-rider. An exception in the contract of insurance has been made i.e. by covering the risk of the driver of the vehicle. The deceased was, indisputably, not the driver of the vehicle. The contract of insurance did not cover the owner of the vehicle, certainly not the pillion-rider. The deceased was travelling as a passenger, stricto sensu may not be as a gratuitous passengers as in a given case she may not (sic) be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger. In view of the terms of the contract of insurance, however, she would not be covered thereby."

.... (Para 21 & 22)

8. On going through the aforesaid observations of the Hon'ble Apex Court it has been made sufficiently clear that if the policy involved in the matter is an 'act only' policy, which covers the risk of third party only, cannot be used for covering the risk of owner of the motorcycle or the pillion rider.

9. On perusal of the impugned judgment, it appears that the learned Tribunal has relied upon the observation of the Division Bench of this Court, in the case of ***Ajay Ramesh Bhoir vs. Avinash Shantaram Jadhav***, reported in III (2004) A.C.C. 130 (Division Bench), wherein it is observed as below :

"The question is completely changed when the new Motor Vehicles Act, 1988 came into force. In Section 147 of the Motor Vehicles Act there is no limit in certain cases as contained in Clause (ii) of the old Act. The corresponding provision in the old Act contains three clauses whereas now there are only two clauses. What was dropped in the new Act is the clause which excluded the coverage for death or bodily injury to persons carried in or upon the vehicle. That means such liability cannot now be excluded from the policy. Therefore, when the policy of insurance is an 'Act policy' then insurance company will not stand absolved from the liability in respect of the pillion rider of the motorcycle."

However, in view of the aforesaid observation of the Hon'ble Apex Court in the subsequent judgment cited supra, the risk of pillion rider is not covered under the policy in this matter since there was no premium paid to that effect.

10. Further, the Hon'ble Apex Court in the case of ***Mohana Krishnan S. vs. K. Balasubramaniam and others, reported in 2022 LiveLaw (SC) 726***, has referred the aforesaid judgment and another judgment reported as ***2006 (4) SCC 404 (Larger Bench)*** for considering the question of law i.e. whether the third party includes all other persons other than the insured, who is the first party and the insurer, who is the second party. It appears that the Hon'ble Apex Court has *prima facie* reservation about the view expressed in the aforesaid judgments that the pillion rider does not come under the expression 'third party'. Be that as it may, but the current view is that the pillion rider in absence of any premium

paid to cover its risk, is not entitled for compensation from the insurance company. In the instant matter, a specific evidence is laid by the appellant - insurance company by examining its Assistant Branch Manager Kiran Digambar Vaidya as its first witness. This witness has also produced certificate of insurance at Exh.35 under which the motorcycle involved in the accident was insured. On going through the said certificate of insurance at Exhibit-35, it is clearly evident that the policy of the said motorcycle was 'act only' policy and it is also evident that no premium was paid to cover the risk of owner or pillion rider. Even the policy at Exhibit-29 filed by the claimants has also disclosed that it was an 'act only' policy. Thus, considering all these aspects and view expressed by the Hon'ble Apex Court in the judgment of **Oriental Insurance Company Ltd. vs. Sudhakaran** (supra), I come to the conclusion that the risk of deceased in this case, was not covered under the insurance policy on record. Thus, the learned Tribunal has definitely erred in holding that the appellant - insurance company is also liable to pay compensation to the claimants along with the legal representative of owner of the said motorcycle under joint and several liability.

11. Now I come to the alternative submission of the learned counsel for the respondents - claimants, whereby he has requested to pass order of pay and recover against the insurance company. It is significant to note that the appellant - insurance company has already deposited the entire amount of compensation alongwith interest as per the order dated 29/04/2011. Further, this court vide order dated 07/12/2012 has also allowed respondents - claimant Nos.1 to 3 to withdraw substantial amount of Rs.1,50,000/- from the total amount of compensation inclusive of

interest. The learned counsel for the respondents/claimants thus, submitted that since the substantial amount of compensation has been withdrawn by the claimants, pay and recover order needs to be passed considering the fact that the claimants being poor persons are unable to refund the same, if the insurance compensation is exonerated completely. As against thus, the learned counsel for the appellant - insurance company pointed out that the order of pay and recover, which has been passed by the Hon'ble Apex Court in number of cases, is in fact passed under the powers of the Hon'ble Apex Court as per Article-142 of the Constitution of India and the said power is neither available to this court nor to any Motor Accident Claims Tribunal.

12. 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”.

13. Thus, from these observations, it has been made abundantly clear by the Hon'ble Apex Court that considering the peculiar facts of the 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 the breach of policy conditions.

In the instant case also the accident has taken place long back i.e. in the year 2001. Moreover, the insurance company has already deposited the compensation alongwith the interest long back i.e. in the year 2011 and out of which, this court already allowed the respondents / claimant Nos.1 to 3 to withdraw an amount of Rs.1,50,000/-. Therefore, considering the poor financial condition of the respondents / claimant Nos.1 to 3, it will be harsh to ask the appellant - insurance company to recover the amount of compensation already paid to the claimants. On the contrary, as per the observation of the Hon'ble Apex Court in the aforesaid cases and also by keeping in mind the benevolent object of the Act, the pay and recover order needs to be passed.

14. In the result, following order is passed.

ORDER

- I) The appeal is hereby partly allowed and the appellant - insurance company is totally exonerated from the liability of paying compensation to the claimants. However, the appellant - insurance company shall satisfy the award first and then recover the entire amount of compensation as deposited in this court from the legal representatives of the owner of the offending motorcycle bearing No.MH-18-B-6815 i.e. from the present respondent No.5A.
- II) The balance amount of compensation alongwith the accrued interest thereon, which is lying with this court, is allowed to be withdrawn by the present respondent Nos.1 & 4 - claimants and it be distributed between them in equal proportion.
- III) The appeal is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)