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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

FIRST APPEAL NO.104 OF 2012

The New India Assurance Company Limited,
Through its Regional Manager, Regional
office at Dr.Ambedkar Bhavan, 4th Floor,
Seminary Hills, Nagpur – 440 006. **Appellant.**

:: V E R S U S ::

1. Suryabhan s/o Janu Chouke, aged about
42 years, occupation agriculturist,
Resident of Pendhari, tahsil Sindewahi,
District Chandrapur.

2. Smt.Saraswati wd/o Janu Chouke, aged
about 61 years, occupation household,
Resident of Pendhari, tahsil Sindewahi,
District Chandrapur.

(respondent No.2 is deleted)

3. Smt.Reeta w/o G.Patnayak, aged major,
C/o Konark Marketing, opposite LIC
Office, Pendri, Raipur, 492 001.
(Chhattisgarh). **Respondents.**

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Shri M.B.Joshi, Counsel for the Appellant.
None for Respondents.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 31/01/2023

PRONOUNCED ON : 17/03/2023

JUDGMENT

1. The present appeal is preferred under Section 173
of the Motor Vehicles Act, 1988 (for short, "the said Act") by
the New India Assurance Company Limited against judgment
and award dated 25.7.2011 passed by learned Chairman,

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Motor Accident Claims Tribunal at Chandrapur (learned Member of the Tribunal) in MACP No.99/2004. The parties are hereinafter referred as per their original nomenclature.

2. Brief facts of the case are as follows:

Applicant No.1 Suryabhan is son and applicant No.2 Saraswati is widow of deceased Janu Chouke. On 29.3.2004, the deceased went along with Balkrushna Ramaji Shende, Vishwanath Chintaman Wanjari, Dnyaneshwar Ramteke, and Santosh Khobrage for purchasing and selling transaction of bullocks. The deceased was working as broker of bullocks and the above said persons were also involved in purchasing and selling of bullocks. The above said persons were to recover credit amount from one Ganesh Sahare who had purchased bullocks from them and, therefore, the deceased along with the above named persons travelled in a Tempo Trax from Botekasa Fata. The said Tempo Trax bearing No.CG-04-ZD-2268 was driven in a rash and negligent manner. As the said vehicle was driven in excessive speed, the driver of the vehicle could not control the said vehicle and dashed against one tree which was on the left side of the

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road. Due to the severe dash, the said vehicle turned turtle and the deceased sustained grievous injuries. Though the deceased was taken to the hospital, he was declared dead. Regarding the said accident, a crime was registered against the driver of the said vehicle. The said vehicle was owned by the opponent No.2 and validly insured with the opponent No.1. At the time of the accident, the deceased was 62 years old and earning Rs.3000/- per month. As per the claimants, as the said accident took place due to a rash and negligent driving of the driver owned by opponent No.2 and validly insured with opponent No.1, both the owner and Insurance Company are jointly and severally liable to pay the compensation.

3. In response to the notice, the opponent No.2 – owner of the said vehicle remained absent and, therefore, the petition proceeded as *ex parte* against her.

4. The opponent No.1 – Insurance Company resisted the claim by filing written statement vide Exhibit-16. As per the defence of the Insurance Company, the deceased was travelling as a gratuitous passenger in vehicle Tempo Trax

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bearing No.CG-04-ZD-2268. The said vehicle was for private use and for domestic purpose. However, opponent No.2 – owner of the vehicle used the said vehicle for carrying passengers and therefore, the Insurance Company is not liable to pay the compensation.

5. Before learned Member of the Tribunal, the claimant has adduced the evidence as well as eyewitness namely Vishwanath Chintaman Wanjari was examined.

6. In support of the defence, no evidence is adduced by the Insurance Company.

7. Learned Member of the Tribunal has found that the deceased was travelling in the said vehicle which was used for commercial purpose though the said vehicle was for private purpose.

8. The evidence on record shows that the said vehicle was used for carrying the passengers.

9. While holding that owner of offending vehicle has committed breach of insurance policy and Insurance Company is not liable to pay compensation, in given circumstances

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directed the insurer to first pay compensation and then recover it from the insured or owner of offending vehicle by relying upon various judgments.

10. I have heard learned counsel Shri M.B.Joshi for the appellant – Insurance Company. Though respondents were served with Notices, none appeared for them.

11. The only point arises for determination is:

Whether learned Member of the Tribunal is justified with power to direct the insurer to first pay the amount of compensation and, thereafter, recover the same from the insured?

12. Learned counsel Shri M.B.Joshi for the appellant – Insurance Company vehemently submitted that opponent No.2 - the owner of the said vehicle has committed breach of terms of the insurance policy. The deceased was a gratuitous passenger and cannot be regarded as third-party. Expression third-party needs to be determined in each case with reference to terms of the insurance policy. If risk of a person is covered under the contract of insurance, he/she should be third-party regarding whom insurance covered can be used and insurer will be liable to indemnify his/her legal

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representatives. However, a person, who is not covered under terms of insurance policy, cannot be treated as third-party within the meaning of provisions of Sections 147 and 149 of the said Act. Gratuitous passenger cannot be regarded as third-party.

13. In support of his contention, learned counsel Shri M.B.Joshi for the appellant – Insurance Company has placed reliance upon the decisions of this Court (Bench at Aurangabad) in the case of United India Insurance Company Limited vs. Sau.Aruna Sudhakar Zarekar, First Appeal No.1043/2009 decided on 20.8.2009; United India Insurance Company Limited vs. Anubai Gopichand Thakare and others, reported in 2008(1) Mh.L.J. 73 and upon the decision of the Honourable Apex Court in the case of National Insurance Company Limited vs. Parvathneni and another, reported in 2009(4) TAC 382 (SC).

14. There is no dispute that the accident occurred on 29.3.2004 near Majumkheda Fata, on Botekasa Bori State High Way. The deceased was travelling along with other villagers in Tempo Trax bearing No.CG-04-ZD-2268.

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15. As per the contention of claimant Suryabhan s/o Janu Chouke, on 29.3.2004 the deceased went along with Balkrushna Ramaji Shende, Vishwanath Chintaman Wanjari, Dnyaneshwar Ramteke, and Santosh Khobrage for purchasing and selling transaction of bullocks. The deceased was working as broker of bullocks and the above said persons were also involved in purchasing and selling of bullocks. The above said persons went to recover credit amount from one Ganesh Sahare who had purchased bullocks from them and, therefore, the deceased along with the above named persons travelled in a Tempo Trax from Botekasa Fata.

In support of the contentions, the claimant examined himself. During cross-examination, it came on record that the said vehicle was taken on rent.

16. Eyewitness namely Vishwanath Chintaman Wanjari was also examined. He also stated that he along with other villagers and the deceased was travelling in the said vehicle by paying the rent.

17. Thus, the evidence of both these witnesses shows that the deceased as well as eyewitness Vishwanath was

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travelling in the said vehicle by taking it on rent as a gratuitous passenger.

18. The Insurance Company has come with a defence that the said vehicle was a private car and the policy was issued as "Private Car Policy". Thus, opponent No.2 - the owner of the said vehicle has contravened the terms and conditions of the policy by giving the said vehicle on rent.

The said contention of the Insurance Company is substantiated by its witness Sanjay Keshavrao Vaddelwar examined vide Exhibit-53. He reiterated that the insurance policy issued to opponent No.2 - the owner of the said vehicle was as Private Car Policy. The owner of the said vehicle had given the said vehicle on rent. Thus, there is breach of policy.

19. Learned Member of the Tribunal, after considering the evidence on record, has recorded the finding that the deceased and others were proceeding in the said vehicle as a gratuitous passenger, is proved through the evidence of the claimant Suryabhan as well as eyewitness Vishwanath Wanjari. The insurance policy shows that the said vehicle was meant for private use only. The driver of the said vehicle

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allowed the deceased and others to board in the said vehicle and accepted the fare. These admissions are sufficient to prove that the private vehicle was used for commercial purpose. Thus, the admission given by both these witnesses is sufficient to show that there is a breach of the policy. Learned Member of the Tribunal further held that even in the breach of policy conditions, the Insurance Company cannot be absolved from its liability towards third-party. The Insurance Company can, however, seek recovery of amount from the owner of the said vehicle.

The Insurance Company challenged the above findings on the ground that there was a breach of conditions of the policy as passengers were travelling in the said vehicle which was used for commercial purpose though the said vehicle was for private purpose. However, learned Member of the Tribunal directed the Insurance Company to pay the amount of compensation and recover the same.

20. In support of contention by learned counsel Shri M.B.Joshi for the appellant – Insurance Company, placed reliance upon the decision of this Court (Bench at Aurangabad) in the

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case of United India Insurance Company Limited vs. Anubai Gopichand Thakare and others cited *supra* wherein "the expression of third-party is determined." It is held that the expression third-party needs to be determined in each case with reference to terms of the Insurance Company. If risk of a person is covered under the contract of insurance, he/she should be third-party regarding whom insurance covered can be used and insurer will be liable to indemnify his/her legal representatives. The gratuitous passenger cannot be regarded as third-party because he is not signatory to the insurance contract. Hence, the insurer cannot be held liable even for the purpose of satisfying the award in respect of the gratuitous passenger.

He further placed reliance upon the decision of this Court (at Aurangabad) in the case of United India Insurance Company Limited vs. Sau.Aruna Sudhakar Zarekar cited *supra* wherein it is held that when specific finding is recorded by the tribunal that there was a breach of conditions of policy and defence taken by the Insurance Company under Section 149(2) of the said Act is accepted then it gives no jurisdiction to the tribunal to pass an order holding the Insurance

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Company either jointly or severally liable for payment of compensation. The tribunal has no jurisdiction to direct the Insurance Company to pay first and recover amount from the owner or driver which is without jurisdiction.

21. The Honourable Apex Court in the case of **M/s.National Insurance Co. Ltd vs Baljit Kaur and others,** reported in **2004 ACJ 428** has considered the question that whether an insurance policy in respect of a goods vehicle would also cover gratuitous passengers, in view of the legislative amendment in 1994 to Section 147 of the said Act.

22. The Tribunal as well as the High Court relying upon the judgment of the Honourable Apex Court in the case of **New India Assurance Company vs. Shri Satpal Singh and others,** reported in **2000(1) SCC 237** has accepted the claim petition and rejected the contention of the Insurance Company that the concerned vehicle being goods vehicle it would not have to incur any liability with respect of passenger transported in the vehicle. The said decision has been overruled by the Honourable Apex Court in the case of **New India Assurance Company Limited vs. Asha Rani** reported in

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2003 ACJ 1 wherein it has been held that insurer was not liable to pay compensation in respect of passengers travelling in goods vehicle. In the case of **National Insurance Company Limited vs. Swaroopa and others**, reported in **2006(5) ALL MR (SC) 119** the Honourable Apex Court has referred both the judgments of in the cases of **New India Assurance Company vs. Shri Satpal Singh and others** and **New India Assurance Company Limited vs. Asha Rani** cited *supra* and referred the ratio that an insurance company will not be liable to pay compensation in respect of gratuitous passengers being carried in a goods vehicle if the vehicle meets with an accident. In view of the above said judgments, the Honourable Apex Court has set aside the judgment of the High Court affirming the order of the tribunal and mentioned that we, however, clarify that the amount of compensation, if any, that may have been paid to respondents, shall be recoverable by the Insurance Company from the owner of the vehicle.

Thus, it is held by the Honourable Apex Court that owner of vehicle is liable to pay compensation, however, if the Insurance Company has paid the compensation, it can recover

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it from owner of vehicle and not from the legal representatives of deceased.

23. This Court has also in the case of **Bajaj Allianz General Insurance Limited vs. Smt.Sangita w/d Bhagwan Raut and others**, reported in **2015(1) ALL MR 305** referred the judgment of this Court in the case of **Traders Private Limited, Ahmedabad and another vs. Sunanda wd/o Krishna Machivale and others**, reported in **2008(5) ALL MR 757** wherein the Division Bench of this Court has observed in paragraph No.59 that such directions have been issued by the Honourable Apex Court in exercise of its jurisdiction under Article 142 read with Article 146 of the Constitution of India for doing complete justice for the parties and that such powers do not vest in the High Court to pass similar order. At the same time, the Division Bench in paragraph No.56 observed that such directions cannot be issued in all cases thereby implying that where facts and circumstances of the case warrant, the direction to first pay the compensation and then recover it from the owner of the offending vehicle can be issued.

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24. In the case of United India Insurance Company vs. Sindhubai, reported in 2010 ALL MR (Supp.) 220, after referring the catena of judgments of the Honourable Apex Court as well as this Court, has held that "therefore, as the legal position stands today, there is a power vesting in tribunal and in this Court, depending upon the facts and circumstances of each case. to direct the insurer to pay compensation amount and, thereafter, to recover the same from the insured."

25. From the above discussion, it is crystal clear that it is not in every case the tribunal must direct the Insurance Company to pay first the amount of compensation and then recover it, but it depends upon the facts and circumstances of each case.

26. Now the question is, whether learned Member of the Tribunal, in facts and circumstances of the case, should have issued the direction to the Insurance Company to pay first the compensation amount and then recover it from the insured or not.

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27. Upon going through decisions of the Honourable Apex Court so also this Court, no error is committed by learned Member of the Tribunal by exercising the jurisdiction in issuing the impugned directions. Claimant No.1 is major son and claimant No.2 is widow of the deceased. Due to the death of the deceased, claimant No.2 - the wife of the deceased lost the company of her husband and it is extremely difficult to once again knock doors of the Court by preferring execution proceeding against the owner of the said vehicle and it is difficult for the poor and illiterate litigants to recover the amount of compensation from the owner. On the other hand, the Insurance Company would be in a position to recover the amount from the owner of the said vehicle and, therefore, I see no illegality in the order passed by learned Member of the Tribunal directing the Insurance Company to pay the compensation amount first and then recover the same from the insured. Hence, the point is answered in affirmative.

28. In view of the above discussion, the first appeal deserves to be dismissed confirming the directions to the Insurance Company to first pay the compensation amount and

Judgment

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recover the same from the insured. As such, the appeal is **dismissed**. However, there shall be no order as to costs.

(URMILA JOSHI-PHALKE, J.)

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