IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3885 OF 2017

United India Insurance Co. Ltd.,
Through Its Branch Manager,
2nd Floor, Dayawan Complex,
Near Hotel Rajdhani, Station Road,
Parbhani

Through its Authorized Signatory/
Divisional Manager, Divisional ...Appellant
Officer, Osmanpura, Aurangabad (Ori. R. No. 2)

Versus

1. Saminabegum W/o. Jarifkhan Pathan
Age: 31 years, Occ: Household,

2. Sayamabee D/o Jarifkhan Pathan
Age: 17 years, Occ: Nil,

(Being Minor u/g of Respondent No. 1)
R/o. Beldarpura, Near Pola Maroti, Hingoli.
Tq & Dist. Hingoli.

3. Trimbak S/o. Pandurang Gangawane,
Age: 54 years, Occ: Business,
R/o. Khed, Tq. Dist. Hingoli

4. Shaikh Ahmad S/o Shaikh Rajjak,
Age: Major, Occ: Labour,
R/o. Beldarpura, Hingoli,
Tq & Dist. Hingoli ...Respondents

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Mr. M. R. Deshmukh, Advocate for the Appellant
Mr. S. V. Suraywanshi, Advocate for Respondents

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CORAM : R.M. JOSHI, J.
RESERVED ON : JANUARY 22, 2024
PRONOUNCED ON : FEBRUARY 07, 2024

JUDGMENT

1. This First Appeal raises questions as to whether the insurer is liable to pay compensation in respect of death of deceased who was travelling in a private car, insured under act policy & as to whether the order of pay and recover can be passed against insurer.

2. Deceased Jarif Khan was one of the gratuitous passengers travelling in Jeep bearing No. MH-02-A-7307. Owing to the negligent driving of the said vehicle by its driver, deceased was thrown out of the vehicle and owing to the injuries caused therein, he died. The claim for the compensation under Section 166 of the Motor Vehicles Act, 1988 (for short '**said Act**') was filed against owner and insurer of the vehicle.

3. Insured vehicle was covered by act policy and admittedly no additional premium was paid by the insured in respect of coverage of the passenger in the vehicle. Learned Tribunal by passing impugned judgment and award held owner and insurer jointly and severally

liable to pay compensation of Rs. 7,01,000/- with interest @ 8% pa. Insurer being aggrieved by this award has preferred Appeal under Section 173 of the Act.

4. Learned Counsel for the insurer submits that once it is proved that the vehicle is covered by the act policy, the insurer would not be liable to pay any compensation except to the third party and that in this case deceased is not third party. In order to support his submissions, he placed reliance on the judgment of this Court in case of ***New India Assurance Co. Ltd Vs. Lilabai Shrimant Misal and Others, 2014 (2) TN MAC 397 (Bom)***. Thus, according to him, learned Tribunal has committed error in holding insurer jointly and severally liable to pay compensation to the claimants. It is his further submission that even no order of pay and recover can be passed against insurer, in the facts and circumstances of the case.

5. Learned Counsel for the claimants opposed the said submissions by relying upon the judgment of full bench of Madhya Pradesh High Court in case of ***Jugal Kishore and Another Vs. Ramlesh Devi and Others, 2003 (4) M.P.L.J. 546***, wherein according to him it is held

that the passenger of private vehicle is third party and hence, insurer is liable to satisfy award. By referring to Section 2(33) of the Act it is contended that the vehicle involved in the accident in question was permitted to carry more than six persons and it being a private vehicle, the passenger is also covered even under the act policy. He further submitted that the Hon'ble Apex Court has held that it is open for the Tribunal to direct the order of pay and recovery and as such, the same deserves to the followed in this case. To support his submissions, he placed reliance on following judgments: ***United India Insurance Co. Ltd Vs. Sukumarbai and Others, 2019 SCC OnLine Bom 1469***, ***Shivaraj Vs. Rajendra and Another, 2019 (4) Mh.L.J. 16***, ***Manuara Khatun and Others Vs. Rajesh Kumar Singh and Others, (2017) 4 SCC 796***, ***Jugal Kishore and Another Vs. Ramlesh Devi and Others, 2003 (4) M.P.L.J. 546***. Without prejudice to his contentions, finally he urges that having regard to the fact that the claimants have lost their bread earner on death of deceased, order to pay and recover be passed.

6. It is now no more res integra that in case of

Act policy insurer will not be liable for paying compensation when a private car meets with an accident and a gratuitous passenger dies as a consequence of the accident. In this regard reference can be made to judgments of Hon'ble Apex Court in case of ***Dr. T. V. Jose V. Chacko P. M. Alias Thankachan and Others, AIR 2001 SC 3939*** & ***United India Assurance Co. Ltd Vs. Tilak Singh and Others, 2006 (4) SCC 404***. It is held in T. V. Jose (supra) that:

> *In this case only the first sheet of the policy is on record. This clearly shows that the policy is a third party policy. The terms and conditions governing this Policy are not on record. What was shown to Court was terms and conditions of a comprehensive policy relating to private cars. These cannot apply to this policy. In the absence of terms and conditions governing this policy it is not possible to accept the submission of Mr. Iyer that this policy covered liability to occupants of the car. As has been set out hereinabove, the law on this subject is clear, a third party policy does not cover liability to gratuitous passengers who are not carried for hire or reward. The 8th Respondent Company will, therefore, will not be liable to reimburse the Appellant.*

Since in the instant case the vehicle in question was not covered by comprehensive/package policy but under Act policy, and as deceased was gratuitous passenger travelling in a private car, the insurer would not be liable to pay compensation to the claimants for death of deceased for want of coverage of his risk under the policy. Thus, the Tribunal could not have held the insurer liable for payment of compensation and as such order of fastening joint and several liability of insurer cannot sustain.

7. Now question arises as to whether there would be an order of ‘pay and recover’ against insurer in this case. In order to decide this issue it would be relevant to take into consideration relevant provisions of Section 146, 147 and 149 of the Act.

8. Section 146 of the Act provides for compulsory insurance against third party risk. This provision aims at giving protection to a third party in respect of death, bodily injury or damage caused to the property by use of the vehicle in a public place. This provision needs to be read with Section 147 which deals with the statutory requirement as well as contractual obligations of insurer and insured. Thus, once a valid insurance policy is issued, which provides for

compulsory insurance of motor vehicle, insurer undertake its liability to third parties and the right of third party is not affected by any other condition in the policy or failure of compliance of any condition by insured.

9. As regards contract policy, Section 147 speaks about the requirements of policy and limits of the liability. The liability of insurer is subject to sub-section (1) and (2) of Section 147 of the Act. In cases covered by sub-section (1) of Section 149 read with Section 147 insurer steps into shoes of insured and is bound to pay compensation awarded to third party. In case of contractual policy or act policy, liability of insurer to satisfy the award qua third party is absolute.

10. According to Section 149(1) and (2), apart from the contract otherwise than legal requirements those conditions must be stipulated specifically to bind contracting parties. As per law of contract in case of breach of condition of contract/policy by insured, there would be no liability of insurer to indemnify the injured. However, insurer can avoid such

liability only on grounds mention under Section 149(2) of the Act. Section 149(5) covers a situation wherein pay and recover order can be issued. It enables insurer to recover the amount payable exceeds liability covered by policy from insured.

11. Hon'ble Apex Court in case of ***National Insurance Co. Ltd. v. Swaran Singh 2004(3) SCC 297***, has dealt in details above referred provisions and held that Tribunal has power under section 165 read with Section 168 of the Act to decide not only claims between claimants on one hand and insured, driver and insurer on other, but has power to decide disputes inter se between insurer and insured including the enforceability of award. When the insurer has proved its defence in accordance with Section 149(2) & (7) it is open for Tribunal to compel insurer to pay compensation to third party and recover the same from insured. Thus, insurer would be liable to pay compensation and cannot avoid to do so, unless the breach of conditions is fundamental in nature. In case of ***Shamanna Vs. Divisional Manager and Others, AIR 2018 SC 3726***, in the light of Section 147 and 149 has been

held that in case of third party award passed against the insured the some has to be paid by insurer and recovered from insured.

12. Having regard to the relevant provisions of the Act and law settled by Hon'ble Apex Court an order of "pay and recover" can be passed even by Tribunal and High Court. However, such order must be passed taking into consideration the facts and circumstances of each case and only in cases where there would be statutory obligation of insurer to pay compensation in spite of breach of conditions of policy and to recover it from insured later on.

13. From above discussion and having regard to the provisions of the Act and binding precedents a distinction will have to be drawn from the facts and circumstances/situations to call upon insurer to pay compensation or satisfy award, which can be summarized as under:

> *(i) To the extent of third party claim in respect of Act as well as contractual policy irrespective of any defence available for insurer to limit/deny its liability, insurer is bound to satisfy award.*

> *(ii) In case of breach of policy, which is non fundamental, insurer would be liable to pay compensation to person or classes of persons covered by policy and recover the same from insured.*
>
> *(iii) In case of any person or class of persons not specified / covered in the policy, contractual or Act policy but not third party, insurer cannot be held liable for payment of compensation or even to satisfy the award with condition of pay and recover.*

14. Thus, Tribunal or even this Court would have power to pass order of pay and recover only in case of situation (ii) envisaged above and not otherwise. Needless to record that every accident is unfortunate and it affects the claimants in terms of emotions, finances etc. In spite of having all sympathy towards the claimants, it would not be open for Tribunal or to this Court to direct pay and recover which would be inconsistent with the statutory provisions. As far as judgments cited on behalf of claimants indicates exercise of powers by Hon'ble Apex Court under Article 142 of the Constitution of India. This Article confers unique power to Apex Court to pass such order in exercise of its jurisdiction to do complete justice in

any cause or matter pending before it. Therefore, it would not be open for the claimant to contend that this Court can exercise powers akin to Article 142 of the Constitution of India as exercised by Hon'ble Apex Court in various cases on considering peculiar facts and circumstances of each case.

15. Considering the aforesaid position of law and having regard to the admitted facts and circumstances of the case, since the deceased cannot be treated as third party and as this is case of coverage of vehicle under 'act policy' he would not get covered under the insurance policy issued by insurer to owner/insured, no order ought to have been passed by learned Tribunal holding insurer for payment of compensation to the claimants. Even no order of pay and recover can be passed in the facts and circumstances of the case as there was no liability at all of the insurer to satisfy award for want of coverage of the deceased as a passenger of the offending vehicle and he being not third party.

16. Learned Counsel for original claimants have sought enhancement of compensation. Admittedly, no

appeal or cross-objection has been filed by the claimants. No doubt, it is open for the claimants to seek enhancement of compensation in appeal filed by the other side raising exception to the impugned judgment and award. In the instant case, however, present appeal is filed by the insurer and not by the owner. It is held that the insurer is not liable for payment of any compensation to the claimants. In such circumstances, in the absence of any appeal filed by the owner, it would not be open for this Court to consider the request of claimants for enhancement of compensation. Hence, the same cannot be granted.

17. In view of above, appeal is allowed with modification of award. Hence, the order:

O R D E R

(a) First Appeal is allowed.

(b) Impugned judgment and award dated 17.06.2016 passed in MACP No. 180 of 2008 is modified. Respondent No. 1 shall pay compensation to the claimants as determined by Tribunal.

(c) Rest of judgment and award to remain unchanged.

(d) No order as to costs.

(e) In view of disposal of Appeal, pending application, if any, is also disposed of.

(R. M. JOSHI, J.)

Malani