IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.3158 OF 2018
WITH CIVIL APPLICATION NO.2770 OF 2019
IN FIRST APPEAL NO.3158 OF 2018

New India Assurance Company Ltd.
A company registered under
the Companies Act, and subsidiary of
General Insurance Co. India
Having one of its divisional office at
Adalat road Aurangabad through
Its Authorized signatory ...Appellant
(Org. R.No.3)

Versus

(1) Kamal Wd/o Gangaram Sapkal,
Age 35 yrs, occ. Household
r/o Mhasoba Galli, Near Ram mandir,
Sillod, Tk. Sillod Dist. Aurangabad

(2) Rahul S/o Gangaram Sapkal,
Age 15 yrs, U/g R.No.1

(3) Ashwini d/o Gangaram Sapkal,
Age 13 yrs, U/g R.No.1

(4) Pooja d/o Gangaram Sapkal,
Age 10 yrs, U/g R.No.1

(5) Dwarkabai Wd/o Rambhau Sapkal,
Age 60 yrs., Occ. & Res. As above

(6) Balu Patangrao Chavan,
Age major, Occ. Driver
r/o Wadod Kanhoba, Tk. Khultabad
Dist. Aurangabad

(7) Mobin Munshi Shaikh,
Age major, Occ. Business
r/o Yesgaon, Tk. Khultabad
Dist. Aurangabad …Respondents
(R.Nos.1-5: Org. clmt
R.Nos.6-7: Org.R.Nos.1&2)

...

Mr. Ajit B. Kadethankar, Advocate for Appellant
Mr. P. M. Gaikwad, Advocate h/f Mr. S. D. Kamble, Advocate for Respondent Nos.1 to 5

...

CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 13th AUGUST, 2024
PRONOUNCED ON : 27th AUGUST, 2024

JUDGMENT :

1. Being aggrieved by the judgment and award dated 10/08/2018, passed by Motor Accident Claims Tribunal, Aurangabad, in M.A.C.P. No.481/2016, appellant / Insurance Company has filed this appeal under Section 173 of Motor Vehicles Act, 1988.

2. Gangaram Rambhau Sapkal was traveling by auto-rickshaw bearing No.MH-20-AS-9251, from village Wadodhabazar towards Sillod. Said auto-rickshaw turned turtle and in the accident Gangaram expired. Respondent Nos.1 to 5 / claimants, therefore, filed claim under Section 166 of the Motor Vehicles Act, for compensation of Rs.12,00,000/-, contending that deceased was 45 years old and was earning Rs.15,000/- to Rs.20,000/- per month from vegetable and fruits selling business. Respondent Nos.6 and 7, driver and owner of the auto-rickshaw appeared and opposed the claim contending that offending vehicle i.e. auto-rickshaw is insured with appellant / Insurance Company, hence, they are not liable to pay the compensation.

Appellant / Insurance Company opposed the claim by filing written statement. Age and income of the deceased was denied. It is claimed that auto-rickshaw driver was not holding effective and valid driving license and there was no valid permit in respect of the said auto-rickshaw. Therefore, there is breach of terms and conditions of the policy. It is also contended that policy of the offending vehicle is private car liability and there is no premium paid by the owner of offending vehicle for passengers. At the time of accident excess passengers were traveling in auto-rickshaw, hence, there is breach of terms and conditions of the policy. Therefore, Insurance Company is not liable to pay the compensation.

3. The Tribunal after recording evidence partly allowed the claim and held the driver, owner and Insurance Company jointly and severally liable to pay the compensation of Rs.6,37,000/- along with interest @ 9%. Insurance Company has filed present appeal seeking exoneration from paying compensation

4. Heard learned advocate for appellant / Insurance Company and learned advocate for respondent Nos.1 to 5 / claimants. Though served none appears for respondent Nos.6 and 7.

5. Learned advocate for appellant / Insurance Company by relying on ***New India Assurance Company Ltd. Vs Lilabai Shrimant Misal and Others, 2015(1) Mh.L.J. 827***, submits that since the policy of auto-rickshaw is ‘Act Only Policy’ and no premium was paid in respect of passengers travelling in the same, Insurance Company is not liable to pay the compensation. Tribunal has erred in fastening liability on Insurance Company to pay compensation.

6. Per contra, learned advocate for respondent Nos.1 to 5 / claimants supported the impugned judgment and award. In the alternate, he submits that even if the contention of Insurance Company is accepted for the sake of argument, Insurance Company is liable to pay compensation and recover it from the owner. In support of this submission he relied on unreported judgment of learned Single Judge of this Court at Nagpur Bench in ***First Appeal No.2/2006 (National Insurance Company Ltd. Vs Smt. Veena wd/o Sanjay Dongre and Others)*** and ***Manager, National Insurance Co. Ltd. Vs Saju P. Paul and Another, 2013 (2) SCC 41***.

7. Heard learned advocate for appellant / Insurance Company and learned advocate for respondent Nos.1 to 5 / claimants at length. Perused the record.

8. It is a matter of record that Insurance Company has specifically raised a defence that policy of the offending vehicle was private car liability policy and there was no premium paid by respondent owner for passengers. Hence, Insurance Company is not liable to pay any compensation to claimants. Policy Schedule Cum Certificate of Insurance at Exhibit-32 shows that only third party premium of Rs.1,668/- is paid and no premium is paid to cover personal accident of unnamed persons i.e. passengers. Policy Schedule Cum Certificate of Insurance at Exhibit-49 confirms the

said fact that only third party premium of Rs.1,668/- is paid and for ‘Personal Accident cover for Unnamed Persons’ no premium is paid. Thus, it is clear that the said policy is ‘Act Only Policy’ which covers risk of third party and not the occupants of the auto-rickshaw.

9. In ***T.V. Jose (Dr.) Vs Chacko P.M., 2001 ACJ 2059***, the Apex Court has held that ‘third party policy’/’Act Only Policy’ does not cover the risk of gratuitous passengers who are not carried for hire or reward in transport vehicle. In ***United India Assurance Co. Ltd. Vs Tilak Singh, (2006) 4 SCC 404***, it is held that Insurance Company has no statutory liability to cover the risk of gratuitous passengers in any vehicle including pillion rider of a scooter. When it is a statutory policy, ‘Act Only Policy’, it does not cover the risk to passenger from a private vehicle. Following these rulings learned Single Judge of this Court in ***Lilabai Shrimant Misal*** (supra) held;

> *“16. From the aforesaid discussion it can be said that it is settled law that if no premium is paid in respect of passenger of a private car, there will not be coverage to the risk to them. When there is no coverage of risk, no premium is paid, liability cannot be fastened on the Insurance Company to pay compensation.*
>
> *17. The discussion made above shows that the point of pay and recover does not arise in the case like the present one. In the case reported as 2004 (5) Bom.C.R. 467(S.C.) : (2004) 3 SCC 297 (National Insurance Co. Ltd. Vs. Swaran Singh) the provisions of Sections 149(1), 149(4) and 149(5) of the Act are interpreted and the circumstances in which the Insurance Company can be made to pay are discussed. That case also*

does not show that when there is no insurance cover like in the present case, the Insurance Company can be made to pay first. In view of this position of law, this Court holds that the Tribunal has committed error in holding the Insurance Company liable to pay the compensation jointly and severally with the owner in the present case. To that extent, the decision of the Tribunal needs to be set aside."

10. Though this specific defence was raised by Insurance Company, the Tribunal has failed to consider it while fastening liability on the Insurance Company. Tribunal has not at all adverted to this defence and has misinterpreted the insurance policy. In the impugned judgment and award there is no discussion on this defence of Insurance Company. Thus, impugned judgment and award, to the extent it fastens liability on Insurance Company, stands vitiated for non-application of mind, as the said finding is contrary to the settled legal position that in 'Act Only Policy' Insurance Company is not liable to pay occupants of the offending vehicle, particularly when there is no premium paid for occupants.

11. Learned advocate for claimants strenuously submitted that even if defence of Insurance Company is to be accepted, they may be directed to pay first and recover the same from owner. For that purpose he has relied on ***National Insurance Company*** (supra), wherein learned Single Judge of this Court at Nagpur Bench has held that Insurance Company shall pay the compensation amount and then recover it from owner. Facts in that case were that

deceased Sanjay was occupant of Jeep which gave dash to the stationary truck and he died in the accident on the spot. In the claim filed by legal representatives of deceased Sanjay Insurance Company raised defence of breach of terms and conditions of insurance policy. The Jeep was insured as private car but at the time of accident it was carrying fare paying passengers and in that situation, as the contractual liability of Insurance Company being only towards *bona fide* occupants of the vehicle, that too to the extent of 57,000/- per occupant. Liability of the deceased who was travelling in the Jeep as fare paying passenger and therefore, not a third party, was not covered under the insurance policy. Hence, Insurance company cannot be fastened with liability to pay compensation to respondents/claimants. In these facts and considering the fact that accident had taken place in the year 2000 i.e. around 17 years back, and as the owner of offending vehicle did not appear and did not contest the claim and was no more alive, the Court was of the view that Insurance Company is required to be exonerated from paying compensation amount in view of breach of terms and conditions of insurance policy. The appeal filed by Insurance Company was, therefore, dismissed, thereby confirming direction given by Tribunal to Insurance Company to satisfy the award and recover the same from owner in Execution Proceeding by giving further directions.

Since this decision is rendered in different facts, it is of no help to the case of claimants.

12. In ***Saju P. Paul*** (supra), claimant was a heavy vehicle driver and he was employed with respondent owner as a driver on some other vehicle. He was travelling in a goods vehicle in the cabin, which was driven by one Jayakumar. Many other persons were travelling in the said vehicle. Due to rash and negligent driving of driver Jayakumar the goods vehicle capsized. The claimant suffered fracture and other injuries, which rendered him permanently disabled. He, therefore, claimed compensation of Rs.3,00,000/-. Insurance Company opposed the claim contending that passengers travelling in goods vehicle were not covered under the policy of insurance. Considering these peculiar facts and by referring to Section 147 of Motor Vehicles Act, the Apex Court permitted claimant to withdraw the compensation amount deposited by Insurance Company and observed that Insurance Company thereafter may recover the amount so paid from the owner. Even this ruling does not help the case of claimants.

13. Resultantly, the first appeal is partly allowed. Impugned judgment and award dated 10/08/2018, passed by Motor Accident Claims Tribunal, Aurangabad, in M.A.C.P. No.481/2016, to the extent it directs appellant / Insurance Company to pay the compensation jointly and severally, is hereby quashed and set aside. Claim against appellant / Insurance Company stands dismissed. Claimants are,

however, entitled to recover the compensation amount from owner of the offending vehicle. Pending civil application filed by respondent Nos.1 to 5 / claimants for permission to withdraw the amount deposited by Insurance Company stands dismissed. Amount deposited by appellant / Insurance Company be returned to it. In case, any amount is already paid by Insurance Company on the principle of ‘No Fault Liability’, the same along with interest if any, is allowed to be recovered by Insurance Company from the owner.

(NITIN B. SURYAWANSHI, J.)