IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2929 OF 2019
WITH
CIVIL APPLICATION NO. 4756 OF 2021

HDFC ERGO General Insurance Company Limited.. Appellant
Through its Manager, [original
Branch at : 1st Floor, Plot No.31, Res.No.2]
Land Mark Business Centre, HSG SOC.
Ring Road, Jalgaon
Through its Authorized Signatory,
1st Floor, Renuka Commercial Complex,
Nirala Bazar, Nageshwarwadi, Aurangabad,
Dist. Aurangabad.

Versus

1. Nayajoddin Nijamuddin .. Respondents
Age. 58 years, Occ. Nil, [Res.No.1to
4-original
2. Shahnajbi Bismilla Khan claimant,
Age. 39 years, Occ. Household, Res.No.5 -
R/o. Plot No.73, Near Marimata Mandir, original
Islampur, Jalgaon, Dist. Jalgaon. Res.No.1]

3. Yusuf Nayajoddin
Age. 31 years, Occ. Education

4. Asif Nayajoddin Shaikh
Age. 29 years, Occ. Education,

Respt. Nos.1,3 & 4 R/o. Shaha Karim
Mohalla, Nashirabad, Jalgaon,
Tal. And Dist. Jalgaon.

5. Vikas Babanrao Lakde,
Age. 56 years, Occ. Business,
R/o. Mehrun, Tq. Jalgaon,
Dist. Jalgaon.

Mr.Mohit R. Deshmukh, Advocate for the appellant.
Mr.Vishnu B. Madan Patil, Advocate for respondent Nos. 1 to 4.
None for respondent No.5.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 10.10.2023
PRONOUNCED ON : 01.12.2023

J U D G M E N T :-

01. The insurance company has filed this appeal challenging the judgment and order dated 25.01.2019 passed in MACP No.332 of 2015 by the learned Member, Motor Accident Claims Tribunal, Jalgaon. The learned Member of the Tribunal by way of the impugned judgment and order has allowed the petition. Insurance Company had opposed the claim on the ground of breach of terms and conditions of the policy. The petition in respect of petitioner Nos.2 to 4 came to be dismissed. The owner of the vehicle is held liable to pay compensation of Rs.3,87,000/- including 'No Fault Liability' to

petitioner No.1. However, while allowing claim only against owner, the Insurance Company is directed to first pay compensation and recover the amount from owner of the vehicle. Present respondent Nos.1 to 4 are original claimants and respondent No.5 is original respondent No.1/owner of the vehicle.

02. The appellant is aggrieved by the direction to first pay and then recover the amount from the owner of the vehicle.

03. The facts in short giving rise to the present appeal are that one Sedabi – deceased was travelling in auto-rickshaw in the direction towards Nashirabad from Jalgaon. A truck bearing No. MH-19-Z-3177 proceeding in the same direction suddenly applied breaks. The rickshaw coming from behind brushed the truck and met with an accident. In the said accident the deceased received fatal injuries and died on 02.04.2015. The claim was, therefore, filed seeking compensation of Rs.25 lakhs

against owner of the rickshaw and the insurance company. The claim was opposed on the ground that the claim is false. The truck was not involved in the accident. The cheque that was issued towards insurance premium for amount of Rs.35,430/- was bounced as the account was closed. The insurance company had already issued notice on 12.03.2015 informing the owner about cancellation of insurance policy. After considering evidence the learned Tribunal partly allowed the claim as stated above holding that the policy was not legal and valid.

04. The main question, therefore, to be considered in this case is as to whether the policy in question can be said to be valid and legal, since the cheque issued towards premium was not honoured. Once the policy is not held to be legal and valid, whether the insurance company can still be fastened with the liability to first pay the amount and then to recover the same. The case is based mainly on this legal aspect and other facts are not seriously disputed by any of the parties.

05. The learned Advocate Mr. Deshmukh for the appellant submits that it is clear case that though a cheque was issued towards premium by owner of the vehicle but the said cheque was dishonoured for the reason “account closed”. Only cover note was delivered to the owner. No policy documents were sent. Earlier policy had expired on 22.02.2015. The accident took place on 28.03.2015. Thus on the date of accident earlier policy period had already expired. As the cheque was dishonoured, there was no question of policy being in force thereafter. He submits that this case is accepted by the learned Tribunal in para 26 of the judgment. He further submits that pay and recover order can be passed only in case where policy is found to be in existence. Once it is shown that the policy was not in existence, even direction to pay and recover could not have been issued. He pointed out section 147 of the Motor Vehicles Act. It is his case that even intimation was given to the insured about the cancellation of policy. However,

said intimation could not be served upon the addressee as the envelope was returned as address incomplete. He relied upon judgment in the case of **United India Insurance Co. Ltd. Vs. Lakshmamma & Ors. reported in (2012) 5 SCC 234**. He also relied upon section 64-VB of the Insurance act. He, further, relied upon definition given in section 2(d) and sections 66, 25 and 26 of the Contract Act to submit that in this case, contract itself did not come into existence for non-payment of consideration or lack of payment of consideration. It is also further submitted that the reason for return of cheque also needs to be considered as the same clearly shows that the cheque was issued with deliberate intention to commit fraud. Though right of third party is involved, same is subject to proof of valid contract. He also relied upon provisions of section 167 in respect of indemnification and submitted that it comes in picture only in case of valid contract.

06. He further relied upon judgment in the case of

National Insurance Company Limited Vs. Yellamma and Another, reported in (2008)7 SCC 526.

07. As against this Mr.Madan Patil, learned Advocate for the respondents – claimants submitted that if the policy was cancelled, it was necessary to show that intimation was given to the owner. It was required to strictly prove that the intimation was received by the insured. He relied upon judgment in the case of **Oriental Insurance Co. Ltd. Vs. Inderjit Kaur & Ors., reported in (1998) 1 SCC 371**.

08. To appreciate the arguments, certain dates are required to be take into consideration, which are admitted. Earlier policy of the insured expired on 22.02.2015. The insured issued cheque towards renewal of the policy on 12.12.2015. The accident took place on 28.03.2015. The intimation of cancellation of policy was sent on 12.03.2015. Said intimation could not be served for want of complete address. Considering these dates,

this Court needs to consider as to whether in this case it can be said that the intimation was properly served upon the insured.

09. In the judgment in the case of **United India Insurance Co. Ltd. Vs. Laxmamma and Ors. reported in (2012) 5 SCC 234**, the Hon'ble Apex Court considered the provisions of Sections 149, 146 and 147 of the Motor Vehicles Act. In the said case the cheque issued for payment of premium was dishonoured and subsequent to the accident, the insurer cancelled the policy of the insurance. It was held that it was necessary for the insurer to satisfy the award of compensation unless policy of insurance was cancelled by insurer and intimation of such cancellation had reached insured before the accident. The Hon'ble Apex Court further considered section 64-VB of the Insurance Act, which is reproduced as below :-

> "64-VB. **No risk to be assumed unless premium is received in advance** — (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India

and unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed is made in advance in the prescribed manner.

(2) For the purpose of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation – Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or dispatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty four hours of the collection excluding bank and postal holidays.

(5) The Central Government, may, by rules, relax the requirements of sub-section (1) in respect of particular categories in insurance policies.

(6) The Authority may, from time to time, specify, by the regulations made by it, the manner of receipt premium by the insurer."

. It is held that it is necessary that the intimation of cancellation of policy is reached to the insured.

10. In the case of **Deddappa & Ors. Vs. Branch**

Manager, National Insurance Co. Ltd. Reported in (2008) 2 SCC 595, the Hon'ble Apex Court considered the provisions of sections 147(5), 149(1) and 166 of the Motor Vehicles Act and section 82(c) of the Negotiable Instruments Act. While interpreting the beneficial legislation, it is held that the same should not be considered in a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In the said case, claim was filed under section 166 of the Motor Vehicles Act against a vehicle that was insured with the insurance company. In that case also the cheque issued was dishonoured. The policy was cancelled and therefore the company was not held liable. The learned Tribunal held the insurance company to be liable to pay the amount inspite of cancellation of contract of insurance. The High Court allowed the appeal holding that the insurance company was not liable in case of cancellation of policy. The Hon'ble Apex Court considered that the contract of insurance was cancelled and there was no question and same was not intimated to all the

concerned parties. Nonetheless, in that case it was held that since the appellants i.e. the claimants were from the lowest strata of the society, by invoking Article 142 of the Constitution, directed to pay the amount to the claimants.

11. In the case of **National Insurance Co. Ltd. Vs. Yellamma And Anr. reported in (2008) 7 SCC 526** also the Hon'ble Apex Court by invoking powers under Article 142 of the Constitution, had directed the insurance company to pay the amount though it came to a conclusion that when the insurer cancels the policy, it is not liable to pay the compensation, as the cheques given towards premium were dishonoured.

12. In both the above cases, it is clearly observed that the policy was cancelled and intimation was received by the concerned insured.

13. Learned Advocate Mr. Deshmukh for the appellant

relied upon judgment in the case of **New India Assurance Co. Ltd.Vs. Anjanabai Parashram Jadhav & Ors. reported in 2005 SCC OnLine Bom 782**. In that case the cover note was issued on 08.09.1993. The accident occurred on 28.01.1994. The risk was covered vide cover note for the period 08.09.1993 to 07.09.1994. The letter cancelling cover note was issued by the insurance company addressed to the office of Regional Transport Office. The learned Tribunal had held that the insurance policy was not issued nor that was produced on record. What was produced on record was only a cover note. In that case it was held that the insurance company was not liable to pay the compensation, since the cheque was dishonoured.

14. In the further case relied upon by the learned Counsel for the appellant in the case of **National Insurance Co. Ltd. Vs. Seema Malhotra and Ors., reported in (2001) 3 SCC 151**, the Hon'ble Supreme Court considered the provisions of Section 64-VB, 2(9) and 2-D of the Insurance Act and also considered assumption of risk by

insurer. It is held that the contract of insurance consists of a reciprocal promise, therefore, if the insured failed to pay the promised premium or his cheque is returned dishonoured by the bank, the insurer is under no obligation to perform his part of the contract, **except in relation to his statutory liabilities in respect of third parties.** The Hon'ble Apex Court considered sections 51, 52 and 54 of the Indian Contract Act. It is held that when the preimum is paid there is reciprocal promise. It involves a promise that such money would be paid. When the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned the insurer need not perform his part of the promise. The corollary is that the insured cannot claim performance from the insurer in such a situation. The Hon'ble Apex Court also held that in view of section 25 of the Contract Act, agreement without consideration is void. As per section 65 of the Contract Act, when the contract become void, any person who has received any advantage under such

contract is bound to restore it to the person from whom he received it. It was a case that the claim was made by the insured or his legal heirs without any third party being involved.

. This Court finds that the above cited case is not applicable to the present case as in the present case the claim is by third party under the beneficial legislation. The claimants are the persons who are passengers in the vehicle and not owner or driver of the vehicle.

15. Coming to the judgment relied upon by learned Advocate Mr. Madan Patil in the case of **Inderjit Kaur (Supra)**, wherein the Hon'ble Apex Court had considered section 64-VB of the Insurance Act and sections 147(5), 149(1) and 146 of the Motor Vehicles Act. It was considered that in view of provisions under the beneficial legislation. When the claim is by third party, it is duty of the insurance company to pay the

amount of compensation. In that case the policy of the insurance was issued to the appellant on 30.11.1989. The cheque issued towards premium was dishonoured. A letter was sent by the insurance company to the insured on 23.01.1990. It was specifically informed that since the premium was not received, the company was not at risk. The premium was thereafter paid in cash on 02.05.1990. In the meantime on 19.04.1990 the accident had taken place where bus collided with truck and in the said accident the driver of the truck died. The claim was filed by his widow and minor sons. Said claim was denied by the insurance company in view of section 64-VB of the Insurance Act, as the premium was not received in advance. The learned Tribunal, however, allowed the claim petition. The appeal against that also came to be dismissed by the High Court and the matter was thus taken to the Hon'ble Supreme Court by the Insurance Company. In that case it is held that the insurance company was not absolved of its obligations to third parties under the policy because it did not receive the premium. Its

remedies in this behalf lay against the insured. The appeal of the insurance company was thus dismissed.

16. In the case of **Laxmamma (Supra)** the Hon'ble Apex Court allowed the appeal of the insurance company accepting its defence that the insurance company was not liable to pay by considering provisions of section 64-VB of the Act. In the said case, the policy was for a period 16.04.2004 to 15.04.2005. The cheque was dated 14.04.2004. The accident occurred on 11.05.2004. It is, thereafter, the insurer cancelled the policy by communication dated 21.05.2004.

17. In the judgment in the case of **Oriental Insurance Co. Ltd. Vs. Sadhana Devidas Gujarathi & Ors., reported in 2021(5) Mh.L.J.535**, this Court at Principal Seat considered the liability of the insurer in case of dishonour of cheque. In a similar case this Court has also taken a view that Insurance Company would be liable to pay compensation to third party. This was held in the

case of **New India Assurance Co. Ltd. Vs. Raghunath Aher, First Appeal No.1961 of 2019 (Aurangabad Bench)**.

18. Considering all above judgments this Court finds that the appellant could not produce evidence to show that the intimation of cancellation of policy was received by the insured prior to the date of accident. It is the case of the appellant that the intimation was sent to the insured. However, said intimation was not served for want of complete address. The fact remains that the intimation of cancellation of policy was not received by the insured. Another aspect that needs to be considered in view of judgment of the Hon'ble Apex Court **Inderjit Kaur (Supra)** that a right of third party under beneficial legislation is involved. In the case of **Laxmamma (Supra),** the Hon'ble Apex Court held that the insurance company is not liable, however, it was a case where claim was made by the insured/his legal heirs. Certainly no party can seek benefit of his own wrong. In this case, however, considering the judgment of the

Hon'ble Apex Court in the case of **Inderjit Kaur (Supra)**, question is of third party who is not party to the contract, that too a party who is entitled to receive compensation under beneficial legislation. Looking to the case as it is and taking the facts as it is, this Court finds that no case is made out to interfere with the findings of the Tribunal. This Court finds that there is no merit in the appeal and the same deserves to be dismissed. Therefore, the following order :-

O R D E R

(i) The First Appeal is dismissed with no order as to costs.
(ii) In view of dismissal of the First Appeal, connected Civil Application does not survive and disposed off accordingly.

[KISHORE C. SANT, J.]

. At this stage, learned Advocate for the respondent No.1/claimant makes a request to direct the Office of this Court to allow the respondent No.1/claimant to withdraw the amount lying in this Court, deposited by the appellant. The Office to allow withdrawal of said amount with accrued interest, if any.

[KISHORE C. SANT, J.]

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