IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

FIRST APPEAL NO.935 OF 2014

Bajaj Allianz General Insurance Co.Ltd. ... **Appellant**
Through its Branch Manager,
2nd Floor, Rajendra Chamber,
Adalat Road, Aurangabad.

VERSUS

1. Vimalbai w/o Sominath Harkal
   Age 46 years, Occu: Household
   R/o Jategaon, Tq. Fulambri
   District Aurangabad.

2. Dnyaneshwar Sominath Harkal, ... **Respondents**
   Age 18 years, Occu: Education
   R/o As above.

3. Laxmibai w/o Bhivsan Harkal
   Age 72 years, Occu: Nil
   As above.

4. Bhaginath s/o Laxman Harkal
   Age Major, Occu: Driver-owner
   R/o Jategaon, Taluka Fulambri
   District Aurangabad.

Mr. S. G. Chapalgaonkar,Advocate for appellant.
Mr. R. B. Dhakne, Advocate for respondent No. 1.

CORAM : A. M. BADAR, J.

DATE : 18th November, 2015

ORAL JUDGMENT :

. In view of orders dated 22nd July, 2014 and 27th January, 2015, this appeal is taken up for final disposal at the stage of admission itself.

2. By this appeal under section 173 of the Motor Vehicles Act, 1998, the Appellant/Insurer of motorcycle is challenging the award of the learned Member of the Motor Accident claim Tribunal, Aurangabad, dated 09.01.2014 passed in MACP No.556/2010, awarding compensation of Rs.4.92 lakhs with interest @ Rs. 9% per annum to the claimants on account of death of Sanjay Harkal, caused in vehicular accident which took place on 21.02.2010. Respondents 1 to 3 herein were claimants before the Tribunal and owner of motorcycle was respondent No.1 before the Tribunal. For the sake of convenience, parties shall be referred to in their original status.

3. Brief facts leading to institution of the present proceedings can be summarized thus:

i. It was case of the claimants that on 21.02.2010, while deceased Sanjay Harkal was proceeding towards Fulambri by motorcycle bearing No. MH-20-AU-6732. A brand new motorcycle, which was owned by respondent No.1 and insured by respondent No.2, came from behind the motorcycle of deceased Sanjay. That motorcycle gave dash to the motorcycle driven by

Sanjay causing instantaneous accidental death of Sanjay.

ii. Claimants contended that deceased Sanjay was earning Rs.450/-per day as meson. They claimed compensation of Rs.10 lakhs from respondents.

iii. Respondent No.1/owner of unnumbered motor cycle failed to appear and contest the claim. Respondent No.2 Insurance Company opposed the petition by filing written statement and contended that accident happened because of rash and negligent driving of deceased Sanjay and another motor cycle which came from opposite direction. Insurance company further contended that respondent No.1/ owner of the motorcycle failed to submit requisite information regarding accident including details of driving licence of the driver who was riding brand new motorcycle allegedly involved in the accident. It was further pleaded that motorcycle insured by respondent No.2 was not involved in the accident. Accident was caused because of collusion between motorcycle driven by deceased Sanjay and another motor cycle bearing No. MH-20-AJ-4138. It was further contended that respondent No.1 owner/driver of unnumbered motorcycle was not holding valid and effective driving licence at the time of accident. It appears that the fact of insurance of the motorcycle owned by respondent No.1 was not disputed.

iv. In support of their claim, claimants adduced evidence of claimant No.1 Vimalbai and also adduced evidence of Rahul Dakle, Government Contractor at Exhibit32 in order to prove in come of deceased Sanjay. In rebuttal, no evidence was adduced.

v. By the impugned judgment and order dated 09.01.2014, learned Member of the Motor Accident Claim Tribunal was pleased to allow claim petition partly by directing the respondents to pay compensation of Rs.4,92,000/- with interest @ 9% per annum.

4. Shri Chapalgaonkar, learned counsel appearing for appellant Insurance Company vehemently argued that unnumbered motorcycle owned by respondent No.1, which was insured by the appellant, was not at all involved in the accident. By pointing out F.I.R. as well as spot panchanama, he submits that principles of *res ipsa*

locutor needs to be applied and it should be held that accident happened because of collusion of motorcycle driven by deceased Sanjay with other motorcycle bearing No. MH 20-AJ-4138 which came from the opposite direction and had caused accident.

5. Mr. Chapalgaonkar, the learned counsel further argued that because of breach of terms and conditions of contract of insurance, appellant Insurance Company could not have been held liable to pay compensation to the claimant. By pointing out section 134 of the Motor Vehicles Act, the learned counsel contended that it was the duty of the insured to immediately intimate about the happening of the accident to the Insurance Company with further information regarding name of the driver and details of his driving licence. Despite issuance of notice, respondent No.1 owner/insured failed to comply this requirement and he had not supplied driving licence to the Insurance Company. Shri Chapalgaonkar, learned counsel further argued that issuance of witness summons to respondent No.1 time and again proved futile and on this background, adverse inference needs to be drown in order to hold that respondent No.1 was not holding valid driving licence at the time of accident in question.

6. Shri Chapalgaonkar, learned counsel appearing for the appellant Insurance Company assailed the quantum of compensation assessed by the learned Tribunal by contending that there is no iota of evidence on record in order to infer that the deceased was earning income of Rs.4,000/- per month. As such, in his submission, conclusion made by the Tribunal for loss of dependency is on higher side.

7. The respondents have chosen to remain absent despite notice to them that appeal shall be heard finally at the stage of admission itself.

8. At the outset let us examine whether it was proved that accident in question happened because of rash and negligent driving of unnumbered motorcycle owned by respondent No.1 and insured with appellant/Insurance Company. It is well settled that strict rules of evidence are not applicable to the proceedings for compensation under the Motor Vehicles Act, 1988 as they are not akin to the civil suit. First information report as well as spot panchanama can be looked into for deciding the mode and manner of happening of accident. It is well settled that once factum of accident is

established, burden shifts on the driver, owner and insurer of the offending vehicle as witness to the road accident are not under the control of claimant. How accident happened is always within the special knowledge of driver of the offending vehicle which remains in control of owner of the vehicle and consequently, under the control of the insurer. Certified copy of FIR Exhibit 27 reveals that the same is lodged by rider of motorcycle bearing No. MH-20-AJ-4138 which was coming from opposite direction. The informant Ramnath More had reported to police that motorcycle which was proceeding behind the motor cycle driven by Sanjay had given dash to Sanjay's motorcycle. It was further reported that because of this accident, Sanjay, the rider of motorcycle bearing No.MH 20-AU-6732 suffered head injury and become unconscious. Same is the situation reflected from the spot panchanama at Exh. 28. With this material evidence on record, the learned Tribunal had concluded that accident happened because of rash and negligent driving of motorcycle owned by respondent No.1 and insured by respondent No.2 Insurance Company. I see no error or perversity in this finding of fact recorded by the Tribunal.

9. Now let us examine whether Insurance Company has

proved that unnumbered motorcycle which, on the date of accident, was under cover of insurance policy, was driven by unlicenced driver. It is well settled that burden of proving breach of terms and conditions of insurance policy always lies on Insurance Company as such fact is asserted by the Insurance Company. In the matter of **National Insurance Co. Ltd. Vs. Swaran Singh, reported in 2004 ACJ 1**, the Hon'ble Supreme Court has held that in order to avoid its liability, Insurance Company should not only establish the available defence raised in the proceeding but must also establish the breach on the part of owner of vehicle. In the case in hand, it is contended that Form AA is not having details of driving licence of rider of the motorcycle and there was no intimation in terms of provisions of Section 134 of the Motor Vehicles Act, 1988 by the insured. However, it needs to be noted that it was incumbent on the part of the insurer to adduce substantive evidence on record in order to establish breach of terms and conditions of contract of insurance in order to demonstrate that rider of unnumbered motorcycle was not having valid licence at the time of accident. No such evidence is forth coming. As such, no fault can be found with the finding of the learned Tribunal that Insurance Company failed to prove breach of terms and condition of contract of insurance.

10. This now leads me to quantum of compensation assessed by the learned Tribunal. Argument of learned counsel for appellant that there is no evidence to prove income of the deceased fails to impress this Court as there is evidence of Rahul Dakle–witness No.2 examined by the claimants. This witness, who is Government Civil contractor, is employer of deceased Sanjay. His evidence shows that deceased Sanjay was working at Rs.200/- per day for 20 days in a month. In the wake of this evidence, no fault can be found with the finding of the learned Tribunal that deceased was earning Rs.4,000/- per month. Multiplier of 18 was adopted by the learned Tribunal with deduction of 50% amount towards personal living expenses of the deceased. Accordingly loss of dependency was calculated. There is no reason to dispute the same. The compensation amount so assessed is just and reasonable.

11. In the result, the appeal fails and the same is accordingly dismissed with no order as to costs.

(A. M. BADAR, J.)

JPC