IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3585 OF 2011

1] Anita W/o Sunil Bemte, (Jadhav)
Age : 22 Years, Occu : Household,
R/o Ieetkur, Tq. Kallam,
Dist. Osmanabad.

2] Pratamesh Sunil Bemte, (Jadhav)
Age : 3 Years, Minor U/g of his
Real mother appellant no.1.

3] Ashruba Dnyanoba Bemte (Jadhav)
Age : 55 Years, Occu : Agri & Service,
R/o as above.

4] Sakhubai Ashruba Bemte (Jadhav)
Age : 50 Years, Occu : Household,
R/o as above. ... APPELLANTS
(Orig. Applicant)

VERSUS

1] Shri S. B. Thorat,
Age : Major, Occu : Business,
R/o Diksal, Tq. Kallam,
Dist. Osmanabad.

2] The Manager
The Oriental Insurance Co. Ltd.,
Branch Ambejogai,
Through its Manager,
The Oriental Insurance Co. Ltd.,
Branch near S.T. Bus Stand,
S.B.I. Building, Osmanabad.
... RESPONDENTS
(Orig. Opponents)

...

Mr. Tukaram G. Gaikwad, Advocate for appellants;
Mr. R. J. Godbole, Advocate for respondent no.2.

CORAM : N.W. SAMBRE, J.

DATE : 4th August, 2015

ORAL ORDER :

This appeal by original claimants is directed against the judgment and award dated 30th August, 2010, rendered by the Commissioner for Employees Compensation & Civil Judge Senior Division, Osmanabad, in Workmen's Compensation Application No.6 of 2008.

2. Heard Mr Gaikwad, learned Counsel appearing on behalf of the appellants and Mr Godbole, learned Counsel on behalf of respondent no.2 – insurance company.

3. The facts as are necessary for the decision of this appeal are as under :-

The appellants herein claim that in an accident of auto-rickshaw bearing registration No.MH-25-9190, Sunil; husband of appellant no.1 expired on 30th June, 2007. The said vehicle was owned by respondent no.1 and insured with respondent no.2. Pursuant to the claim moved under the Workmen's Compensation Act, the Commissioner awarded compensation of Rs.4,33,800/- + Rs.2,500/- funeral charges. Respondent no.1 – owner of vehicle was directed to pay interest at the rate of 12% per annum on the said amount from 30th June, 2007 till its realization and respondent no.2 – insurance company was directed to recover the interim compensation of Rs.50,000/- from the vehicle owner.

4. Learned Counsel appearing on behalf of the appellants canvasses following substantial question of law :-

> Whether the Commissioner under the Workmen's Compensation Act has committed an error apparent on the face of record by saddling the liability on the vehicle owner and not on the insurance-company, particularly when the Driver of the vehicle was holding driving licence for light motor vehicle ?

5. In support of above referred substantial question of law, learned Counsel appearing on behalf of the appellants has invited my attention to the observations made by the Commissioner. According to him, it has been brought on record that the husband of appellant no.1 was holding the licence for driving light motor vehicle (non-transport). He would urge that even it is a licence for driving light motor vehicle (non-transport), in view of the law laid down by the Apex Court, in the matter of **Kulwant Singh & ors. vs. Oriental Insurance Co. Ltd.**, reported in 2015 (4) Mh.L.J. 61, the said licence is proved even for driving a light motor vehicle (commercial).

6. The categorization of the vehicle is not in dispute.

7. Learned Counsel would urge that the compensation awarded by the Commissioner be directed to be paid by the insurance company.

8. Mr Godbole, learned Counsel appearing on behalf of respondent no.2 – insurance company has made two-fold contentions; (a) that the monthly income of the deceased is taken into account at the rate of Rs.4,000/- per month without any basis. According to him, in absence of any evidence, the said income, at the most, should have been considered at the rate of Rs.100/- per day and (b) without prejudice to above, he would further urge that once it is an admitted position on record that the Driver of the vehicle was not holding a driving licence to drive a commercial vehicle and was holding a driving licence to drive light motor vehicle, the Commissioner was right in directing the vehicle owner to pay the compensation. In support of his contentions, he has placed reliance upon the judgment of the Apex Court, in the matter of **National Insurance Co. Ltd. vs. Annappa Irappa Nesaria**, reported in **SCC-2008-14-220** and also in the matter of **New India Assurance Co Ltd. vs. Prabhu Lal**, reported in **AIR 2008 SC 614**.

9. It is required to be noted here that the deceased was holding light motor vehicle licence was not in dispute. In view of above, if respondent no.2 insurance company comes out with a plea that there is a breach of condition of insurance policy, the burden lies on it to prove the same. In the present case, respondent no.2 – insurance company has not examined any independent witness, so also it has nothing to be elicited in favour of the insurance company from the evidence of appellant no.1 – claimant Anita. In view of above, the learned Counsel appearing on behalf of the appellants has rightly sought to draw support on the judgment in the matter of Kulwant Singh & ors. (cited supra), particularly, on the observations in paragraphs 9, 10 and 11, which read thus :-

> *"9. We find the judgments relied upon cover the issue in favour of the appellants. In Annappa Irappa Nesaria (supra), this Court referred to the provisions of Section 2(21) and (23) of the Motor Vehicles Act, 1988, which are definitions of 'light motor vehicle' and 'medium goods vehicle' respectively and the rules prescribing the forms for the licence, i.e. Rule 14 and Form No.4. It was concluded :*
>
> > *"20. From what has been noticed hereinbefore, it is evident that "transport vehicle" has now been substituted for "medium goods vehicle" and "heavy goods vehicle". The light motor vehicle continued, at the relevant point of time to cover both "light passenger carriage vehicle" and "light goods*

> *carriage vehicle". A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."*

10. In S. Iyyapan (supra), the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :

> *"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."*

No contrary view has been brought to our notice.

11. Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights."

10. So far as the contention of respondent no.2 – insurance company that the monthly income of the deceased at the rate of Rs.4,000/- ought not to have been accepted in view of the scheme of the Workmen's Compensation Act is concerned, once it is alleged by the claimants that the deceased was earning Rs.4,000/- per month, it was for the respondent to prove that the deceased was not earning Rs.4,000/- per month. Apart therefrom, the vehicle owner has not disputed the position as regards the monthly income of the deceased.

11. In view of above, the Commissioner was right in considering the income of the deceased at the rate of Rs.4,000/- per month.

12. It is required to be noted here that the objection is raised to the payment of compensation, as according to Mr Godbole, the same is required to be paid from the date of application and not from the date of accident. Having regard to the provisions of sections 4 and 4-A of the Workmen's Compensation Act, the compensation is payable immediately after the date of the accident. In the present case, the contract of respondent – insurance company with vehicle owner is of indemnity. Once the said contract was duly established, in my opinion, it was the duty of the insurance company to pay the compensation as claimed. In view

thereof, in my opinion, the appeal deserves to be allowed. Hence, I pass the following order :-

Respondent no.2 – insurance company is directed to pay compensation of Rs.4,33,800/- along with Rs.2,500/- towards funeral charges – (less) Rs.50,000/- interim compensation which is already paid. The amount of compensation shall carry an interest at the rate of 9% per annum from the date of the application.

First Appeal stands allowed in above terms with no order as to costs.

13. At this stage, Mr Godbole urged that respondent no.2 – insurance company be permitted to recover the amount of compensation as awarded, from the vehicle owner. It is required to be noted that once it is held by this Court that there is no breach of insurance policy conditions and in view of the fact that the contract of insurance is a contract of indemnity, in my opinion, the prayer of the insurance company cannot be accepted and thus stands rejected.

(N.W. SAMBRE, J.)

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