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IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 123 OF 2012
AND
FIRST APPEAL NO. 124 OF 2012

FIRST APPEAL NO. 123 OF 2012

Mrs. Francisca Luiza Rocha
widow of Julius D'Rocha
age 44 years, housewife,
resident of H.No.726/1
Muddo Waddo,
Tivim Cansa, Bardez Goa. ... Appellant

V e r s u s

1. Palanivel Gaunder
major in age,
son of Senkottuvel Gaundar
(driver of vehicle TN27/Q-2179)
A. K. Aamudiram Panchal (P.O.)
Namakkal District,
Tamil Nadu,
(Deleted as per order dated 19.11.2009)
2. Mrs. K. Valarmathi
major in age,
wife of Kumarasamy
insured of vehicle no. T.N. 27/Q-2179
9/1/13 Gandhi Nagar,
Seelanaickempatty Salem 636201.
3. Mrs. United India Insurance Co. Ltd.,
through its (a) General Manger
Regd. and head office United India House,
25 hite Road, Chennai – 600 014.

a) Branch Manger
AKM Tower 1st Floor 397-1,
Junction Main Road,
Opp. Union Bank of India,

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Salem 636 004.

4. Mr. Mahesh Bhiku Dessai,
major in age,
driver of vehicle no. GA-02-T-4671.
R/o H.No. 1329, Culawaddo,
Cuncolim, Salcete Goa.
5. Maumeena Travels
(Through Manager)
(insured of vehicle No. GA-02-T-4671)
H.No. 233, Laxetta Varca,
Salcete, Goa, Culwaddo,
6. National Insurance Co. Ltd.,
through its Manager,
Regd. Office 3 Middleton Street,
P.B.No. 9229
Kolkatta 700071. .. Respondents

WITH

FIRST APPEAL NO. 124 OF 2012

1. Mrs. Francisca Luiza Rocha
widow of Julius D'Rocha
age 44 years, housewife,
2. Jason George Rocha
son of late Julius D'Rocha,
major 19 years of age,
student.
3. Joyden Francis Rocha
son of late Julius D'Rocha,
minor 14 years,
All resident of H.No. 726/1
'Muddo Waddo', Tivim,
Cansa, Bardez Goa. ... Appellants.

V e r s u s

1. Palanivel Gaunder
major in age,

son of Senkottuvel Gaundar
(driver of vehicle TN27/Q-2179)
A. K. Aamudiram Panchal (P.O.)
Namakkal District,
Tamil Nadu
(Deleted as per order dated 19.11.2009)

2. Mrs. K. Valarmathi
major in age,
wife of Kumarasamy
insured of vehicle no. T.N. 27/Q-2179
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through its (a) General Manger
Regd. and head office United India House,
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AKM Tower 1st Floor 397-1,
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Opp. Union Bank of India,
Salem 636 004.
4. Mr. Mahesh Bhiku Dessai,
major in age,
driver of vehicle no. GA-02-T-4671.
R/o H.No. 1329, Culawaddo,
Cuncolim, Salcete Goa.
5. Maumeena Travels
(Through Manager)
(insured of vehicle No. GA-02-T-4671)
H.No. 233, Laxetta Varca,
Salcete, Goa, Culwaddo,
6. National Insurance Co. Ltd.,
through its Manager,
Regd. Office 3 Middleton Street,
P.B.No. 9229
Kolkatta 700071. .. Respondents

Mr. J. J. Mulgaokar, Advocate for the appellants.

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Mr. A. R. S. Netravalkar, Advocate for respondent no.3.

Mr. U. R. Timble, Advocate for respondent no.6.

CORAM : K. L. WADANE, J

JUDGMENT RESERVED ON : 27.03.2015

JUDGMENT PRONOUNCED ON : 16.04.2015

J U D G M E N T :

These two appeals are arising out of the judgment and award passed by the Motor Accident Claims Tribunal, Mapusa, dated 21.05.2012 passed in Claim Petition Nos. 88/2008 and 89/2008 respectively.

2. The parties are referred to their original status.
3. The brief facts leading to the above two appeals may be summarized as follows :
4. The claimants i.e widow and two sons of the deceased Julius D'Rocha filed Claim Petition No. 88/2008 for the compensation on account of death of Julius D'Rocha in a motor vehicular accident took place between the vehicle Nos. TN-27/Q-2179 (herein after referred to as the truck) and GA-02-T-4671

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(herein after referred to as the bus). The claimants have claimed the total compensation of Rs.64,90,996/- on account of all permissible heads i.e. pecuniary and non pecuniary damages. The widow namely Mrs. Francisca Rocha has filed another Claim Petition bearing no. 89/2008 for the compensation on account of injuries sustained to her and disablement caused due to the injuries. In both the petitions the parties have led their evidence. In both the petitions, the petitioners have consistently pleaded that they were travelling in a bus from Goa to Valankanni and at that relevant time the truck gave a dash to the bus. The accident caused due to the rash and negligent driving of the bus driver. Hence, all the respondents are jointly and severally liable to pay the compensation. The respondent nos.3 and 6, Insurance Companies of the respective vehicles involved in the accident, submitted their written statement in both the petitions and have resisted the claim petitions on the ground that the driver of the truck was not holding a valid licence as on the date of the accident. They have denied the age, occupation and the income of the deceased and the claimant no.1.

5. I have heard the arguments of Mr. Mulgaonkar, learned counsel appearing for the claimants and Mr. Netravalkar, learned counsel appearing for respondent no.3 and Mr. U. R. Timble,

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learned counsel appearing for respondent no.6. With the help of the learned counsel of both the sides, I have gone through the entire evidence on record and other relevant papers. Considering the evidence on record and upon hearing both the sides the following points arise for my determination in the above appeals.

	<u>POINTS FOR DETERMINATION</u>	<u>FINDINGS</u>
1	Whether the claimants have proved that the accident took place due to the composite negligence of the drivers of both the vehicles ?	No
2	Whether the respondent nos. 3 and 6 are liable to pay the compensation ?	No
3	What Order ?	Appeals are dismissed.

6. **Point No.1** :- During the course of the arguments of Mr. Mulgaonkar, learned counsel appearing for the appellants/claimants has concentrated his arguments mainly on two grounds, i.e. (1) composite negligence of both the drivers and (2) the liability of insurance company of both the vehicles involved in the accident. According to Mr. Mulgaonkar, the accident took place between two vehicles and both the drivers were equally

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responsible for causing the accident. The fact of accident between the two vehicles itself is sufficient to constitute the composite negligence of both the drivers.

7. As against this, it is argued by Mr. Timble, learned counsel for respondent no.6 that even as per the pleadings and evidence of the claimants, the accident occurred due to the negligence of the truck driver/respondent no.1. Therefore, in absence of any pleadings and evidence, one cannot jump and reach to the conclusion that the accident occurred due to the composite negligence of the respondent nos.1 and 4 i.e. the drivers of both the vehicles. Considering the rival contentions and submissions of the both the sides, it is material to mention here that the claimant nos.1 and 2 have filed their affidavits under Order 18 Rule 4 of the Civil Procedure Code and they have reiterated the contents of their claim petitions at Exhibit 1. In their petitions itself they have pleaded that the accident occurred due to the rash and negligent driving of the truck by the respondent no.1.

Note :- Earlier the name of the respondent no.1 was deleted by way of amendment and the name of respondent no.1 is replaced as the driver Kannan.

Any how there is no dispute between the parties as to who was driving the vehicle at the relevant time.

8. On perusal of the petition at Exhibit 1 in both the petitions, there is no pleading of the claimants that the accident occurred due to the composite negligence of both the drivers or there was negligence on the part of the bus driver. So in absence of pleadings there can be no evidence. In the present case, nowhere it is pleaded by the claimants and proved that the accident occurred due to the composite negligence of both the drivers.

9. On scrutiny of the records, it reveals that the panchanama of the scene of offence or sketch has not been produced on record. Therefore, it is very difficult to assess the situation prevailing at the spot of the accident after the accident. Therefore, in absence of any material on record, one cannot jump to the conclusion that the accident took place due to the composite negligence of both the drivers, only because two vehicles are involved in the accident. Therefore, point no.1 is answered in the negative.

10. **Point No.2** :- Mr. Mulgaonkar, learned counsel appearing for appellants/claimants has argued that there is no evidence on record to show that there was breach of the terms and conditions of the policy by the respondent no.2. In absence of such evidence and since the truck was insured with the respondent no.3, it has statutory liability to pay the compensation to the claimants. Therefore, according to Mr. Mulgaonkar, the finding recorded to the issue no.3 by the learned Tribunal is incorrect and therefore it is liable to be corrected. The learned counsel further argued that in view of the insurance of the truck with the respondent no.3, it is liable to pay the compensation to the claimants.

11. As against this, Mr. Netravalkar, learned counsel appearing for respondent no.3 has argued that the claimants have not come with clean hands. The driver of the truck has not produced his driving licence. Therefore, the respondent no.3 has filed petition under Section 170 of the Motor Vehicles Act. The respondent no.2 was aware of the fact that the respondent no.1 had no driving licence. Therefore, the respondent no.2 has not supplied the copy of the driving licence. On the other hand, the insurance company – respondent no.3 had tried its level best to bring best possible evidence on record and according to Mr.

Netravalkar, learned counsel that by the evidence of RW1 Yeshwant Rasaikar, the Divisional Manager of respondent no.3 and RW2 Shri A Babu, Motor vehicle inspector, respondent no.3 has established that at the relevant time of the accident, the truck driver was not holding driving licence. Therefore, the respondent no.3 had no liability to pay the compensation at all.

12. Considering the submissions of both the sides, now it is necessary to refer the certain evidence led by the respondent no.3. The witness Yeshwant Rasaikar has deposed at Exhibit 62 in Claim Petition No. 88/2008 and has stated on oath that the driver of the truck did not hold valid and effective driving licence as on the date of the accident i.e. 16.06.2008. Hence, the respondent no.3 is not liable to pay the compensation. This witness during the cross examination has produced the following documents i.e. copy of the policy, two investigation reports, and certificate by the licensing authority. RW2 Shri A. Babu has deposed at Exhibit 70 and stated on oath that his office has issued certificate regarding the particulars of the driving licence issued to Mr. Kannan (i.e. the truck driver). As per the records, his driving licence expired on 17.04.2008. Almost two months before the date of the accident. The driving licence issued to him was to drive the motor cycle and LMV. Thus, from the documentary evidence as well as oral

evidence on record, it is seen that the driving licence and its period (whatsoever may be its type) was already expired. Therefore, as on the date of the accident, the truck driver was holding no licence.

13. Mr. Mulgaonkar, learned counsel appearing for the claimants has argued that it is for the respondents to prove the breach of the terms and conditions of policy by respondent no.2. It is the transaction or terms and conditions between the respondent nos. 2 and 3. Therefore the claimants have nothing to do with the contract between the respondent nos. 2 and 3. Mr. Mulgaonkar, learned counsel further contended that since the vehicle was insured with the respondent no.3 at the relevant time, it has liability to pay the compensation.

14. As against this, Mr. Netravalkar, learned counsel appearing for the respondent no.3 has argued that since the respondent no.1 was not holding driving licence at all and this is a clear cut breach of the terms and conditions of the policy. Therefore, the respondent no.3 is not at all liable to pay the compensation. Looking to the rival contentions of both the sides, one thing is very much clear that the respondent no.3 had led a positive and concrete evidence that the respondent no.1 was not

holding driving licence at the relevant time of the accident. Best efforts have taken by the respondent no.3 to defend their case by best available evidence before the learned Tribunal. Mr. Mulgaonkar, learned counsel appearing for the claimants has mainly relied upon the observations in the case reported in **(2004) 3 SCC 297** in the case of **National Insurance Co. Ltd., V/s Swaran Singh and others**, along with other cases and relied upon the following observations at para 110 thus :

"110. The summary of our findings to the various issues as raised in these petitions are as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third- party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An Insurer is entitled to raise a defence in a claim petition filed under Section 163- A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of

Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the

award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-

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section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.”

15. I have gone through the facts and observations of the above cited authority. The observations of the above cited authority are inapplicable to the facts of the present case. In the present case, the respondent no.2 has failed to appear and resist the claim. The present case is not relating to a mere absence, fake or invalid licence or disqualification of the driver for driving the vehicle at the relevant time but relates to the driver who was not holding driving licence at all at the time of the accident. In such circumstances, I am of the opinion that the respondent no.3 has no statutory liability to pay the compensation to the claimants as determined by the learned Tribunal. Therefore, I am of the opinion

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that the learned Tribunal has rightly exonerated the respondent no.3 from the liability to pay the compensation. So also there is no evidence on record to show that the accident occurred due to composite negligence of the bus driver and therefore, the learned Tribunal has rightly passed the award as against the respondent no.2 only being registered owner of the offending truck. Hence, there is no substance in the appeals and accordingly both the appeals are dismissed with no order as to costs.

K. L. WADANE, J

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