

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 182 OF 2009**

Smt. T. N. Goreti Furtado e Fernandes
alias Goretti Fernandes,
wife of Domingos B. Fernandes,
aged 47 years, married, service,
resident of B/16, III Floor, Coelho
Apartments, Maimolem,
Mangor Hill,
Vasco-Da-Gama, Goa. Appellant

V e r s u s

1. Shri Mahantesh Veerayya Hiremath
son of Veerayya Hiremath,
major in age, driver of vehicle bearing
registration number GA-02-V-6714
resident of C/o Saguna Hiremath,
House no. 761/1, near Tirupati Temple,
Zuari Nagar, Birla, Sancoale Goa.
2. Shri Gafursaab M. Mulla
major in age, owner of vehicle
bearing registration number GA-02-V-6714
Resident of house No.33,
Opp. Petrol Pump,
Zuari nagar, Birla, Sancoale Goa.
3. National Insurance Company Ltd.,
Insurer of vehicle bearing registration
Number GA-02-V-6714
Vasco-Da-Gama, Goa. ... Respondents

Mr. S. S. Kakodkar, Advocate for the appellant.

Mr. U. R. Timble, Advocate for the respondent no.3.

CORAM : K. L. WADANE, J

JUDGMENT RESERVED ON : 27th March, 2015

JUDGMENT PRONOUNCED ON : 16th April, 2015

J U D G M E N T :

The present appeal is directed against the judgment and award dated 30.04.2009 passed by the Presiding Officer of the Motor Accident Claims Tribunal- III, South Goa, Margao, by which the claim petition of the claimant was partly allowed and the respondent nos. 1 and 2 were directed to pay an additional compensation of Rs.29,733/- along with interest at the rate of 9% per annum from the date of filing of the petition till the final payment.

2. Brief facts of the case may be stated as follows :
3. The parties are referred to their original status.
4. The claimant moved an application under Section 166 of the Motor Vehicles Act for the compensation on account of injuries and permanent disability caused to her in the motor vehicular accident. On 31.01.2008 the claimant was riding a

Honda Activa scooter bearing registration No. GA-06-B-0518 from Sushenashram Vidyalaya, Jetty and was proceeding towards Deepvihar High School, Sada. When she reached at the spot of the accident at about 11.45 a.m. near the place known as Upper Jetty, another vehicle bearing registration No. GA-02-V-6714 proceedings towards Sada gave a dash to the claimant's vehicle. The vehicle was being driven in rash and negligent manner by its driver and the accident occurred due to rash and negligent driving of the vehicle bearing registration No. GA-02-V-6714. After the accident, the claimant was further dragged with the scooter. In the accident, the claimant sustained injuries due to which she is permanently disabled. Therefore, the claimant has claimed total compensation of Rs.2,18,000/- on various heads. The respondent no.3 appeared and filed its written statement at Exhibit 11. Looking to the averments/contents of the written statement, it appears that it is in the form of general denials. The age and occupation of the claimant is specifically denied. Further, the disablement caused to the claimant, the medical treatment, its period and the expenses are denied. It has admitted the insurance of the vehicle however, it was conditional. It has further contended that the respondent no.1 the driver of the Tempo violated the terms and conditions of the policy as he was not possessing a valid driving licence to drive the vehicle involved in

the accident. Looking to the pleadings of the parties, the learned Tribunal has framed three issues. First is relating to the rash and negligent driving, second is entitlement of compensation and third is regarding the breach of the terms and conditions of the policy. The present appeal is preferred by the claimant mainly on the ground that the compensation awarded to her is at a very low side and that the vehicle was insured with the respondent no.3. Therefore, respondent no.3 is also liable to pay the compensation. So far as the findings to issue no.1 is concerned, no appeal or cross objections are filed by the respondents. Hence, the findings recorded to issue no.1 reached to the finality. Thus, the points for determination involved in the present appeal are :

<u>POINTS FOR DETERMINATION</u>	<u>FINDINGS</u>
1 Whether the amount of compensation awarded to the claimant on account of permanent disability to the extent of 25,000/- is legal and proper ?	No
2 Whether the claimant further proves that the respondent no.3 is liable to pay the compensation first to her and then recover it from the respondent no.2 ?	Affirmative
3 What Order ?	Partly allowed

5. To establish the claim of compensation, the claimant led her oral evidence at Exhibit 26 and relied upon the documents i.e. spot panchanama, copy of station diary, R.C. Book of the tempo, medical records, birth certificate, IT return, medical bills and prescriptions, disability certificate and copy of driving licence of the claimant vide Exhibits 27 to 35. In addition to the above evidence, the claimant examined AW2 Santosh Khorjuvenkar at Exhibit 36 and AW5 Sandeep Redkar, eye witness to prove the negligence of the respondent no.1. To prove the permanent disability, the claimant examined AW3 Dr. Anand Kamat and AW4 Dr. Neil Barretto.

6. To prove the breach of the terms and conditions of the policy by respondent no.2, the respondent no.3 relied upon the evidence of Gopinath Salaskar, Police Head Constable and RW2 Mahesh Borkar, Divisional Manager of respondent no.3 coupled with the copy of driving licence of respondent no.1 at Exhibit 50 and insurance policy at Exhibit 52. One Rajesh Shetye is examined as RW3 at Exhibit 55 who is a motor vehicle inspector. After considering the oral as well as documentary evidence led by both the sides, the learned Tribunal has allowed the claim petition as referred to above and exonerated the liability of respondent no.3 on the ground that the respondent no.2 committed breach of

terms and conditions of the policy as the respondent no.1 was not holding a valid driving licence to drive vehicle involved in the accident.

7. I have heard the arguments of Mr. S. S. Kakodkar, learned counsel appearing for the appellant/claimant and Mr. U. R. Timble, learned counsel appearing for respondent no.3 and with the help of the learned counsel appearing for the parties, I have gone through the entire oral as well as documentary evidence on record.

8. Mr. S. Kakodkar, learned counsel appearing for the appellant/claimant has relied on the following judgments :

(i) 2015(1) ALL MR 481(S.C.) in the case of Kulwant Singh & Ors. V/s Oriental Insurance Company Ltd.,

(ii) 2013(3) CPR 478 (SC) in the case of S. Iyyapan V/s M/s United India Insurance Company Ltd., and another.

(iii) 2010(4) T.A.C. 621 (H.P.) in the case of Prem Singh V/s Baldasi and others.

(iv) 2010(2) T.A.C. 661 (Ori.) in the case of Smruti Ranjan Parida V/s Taramani Das and others.

(v) 2010(4) T.A.C. 714 (Ori.) M/s. United India

Insurance Co. Ltd., V/s Prakash Chandra Patra and another.

(vi) 2009(1) T.A. C. 826 (Pat.) in the case of Divisional Manager, Oriental Insurance Co. Ltd., V/s Sabita Devi and another.

(vii) 2008(4) T.A.C. 689 (Raj.) in the case of United India Insurance Company Ltd., V/s Smt. Kamli Devi and others.

(viii) 2014(3) ALL MR (JOURNAL) 53 in the case of The New India Assurance Co. Ltd., V/s Siddarapu Gangaiah and others.

(ix) 2015(1) ALL MR 305 in the case of Bajaj Allianz General Insurance Co. Ltd., V/s Smt. Sangita w/o Bhagwan Raut & others.

(x) 2011(1) ALL MR 402 (S.C.) in the case of Raj Kumar V/s Ajay Kumar and another.

(xi) (2012) 12 SCC 274 in the case of K. Suresh V/s New India Assurance Company Limited and another.

(xii) (2008) 3 SCC 464 in the case of National Insurance Company Ltd., V/s Annappa Irappa Nesaria and others.

no.3 has relied on the judgment passed by the learned Single Judge of this Court dated 14.08.2014 in First Appeal No. 268 of 2008.

10. **Point No. 1** :- On perusal of the evidence on record, it is established by the claimant that in the accident she received injuries due to which she is permanently disabled of 3% and this fact is seen from the evidence of Dr. Barretto. Further, it is seen from the record that the learned Tribunal has taken into consideration all the documents showing the medical expenses and has rightly awarded the compensation in respect of actual expenses incurred by her for medical treatment. However, the learned Tribunal has awarded compensation of Rs.20,000/- for permanent disability which according to me is improper because the fixed compensation is contemplated for the disability to the extent of 25,000/-. Therefore, the learned Tribunal cannot award the compensation less than the amount fixed for the permanent disability irrespective of its percentage. Therefore, the award to that extent needs to be modified. Hence, the point no.1 is answered accordingly.

11. **Point No.2** :- The claim petition was mainly contested on the ground of liability to pay the compensation. According to

Mr. Kakodkar, learned counsel appearing for the appellant/claimant that the respondent no.1 was not holding a valid driving licence to drive Light Motor Vehicle (Non Transport) and it was valid till 06.09.2027 whereas the vehicle driven and involved in the accident was light commercial transport vehicle. By referring to the various authorities, Mr. Kakodkar, learned counsel appearing for the appellant/claimant has submitted that the vehicle involved in the accident was light commercial vehicle and the respondent no.1 was holding driving licence to drive light motor vehicle (Non Transport). According to Mr. Kakodkar, the category of motor vehicle driven by respondent no.1 and category of the light commercial transport vehicle is one and the same. Therefore, the respondent no.3 is also liable to pay the compensation to the claimant being insurer of respondent no.2. According to Mr. Kakodkar, the alleged breach committed by respondent no.2 is not fundamental. He has argued that the respondent no.3 be directed to pay compensation to the claimant first and then to recover it from the respondent no.2 as the vehicle was insured with the respondent no.3 and this fact is not in dispute.

12. As against this, Mr. Timble, learned counsel appearing for respondent no.3 has argued that since the respondent no.2 has committed the breach of the terms and conditions of the policy, all

the citations cited by Mr. Kakodkar are on the law relating to the per-amendment Motor Vehicles Act. Therefore, all the authorities are not applicable to the facts of the present case. According to Mr. Timble, the validity of the driving licence to drive a transport vehicle is only for three years and the validity of the driving licence issued to the respondent no.1 was 30 years. So the driving licence to drive the transport vehicle is required to renew after every three years which cast more responsibility on issuing authority. Therefore, the categories of the light motor vehicle transport and non transport are not one and the same. According to Mr. Timble, the breach of the terms and conditions of the policy has been proved by the evidence of RW1 Gopinath Salaskar and RW2 Mahesh Borkar coupled with the terms and conditions of the policy and the type of the driving licence at Exhibit 50. So according to Mr. Timble, if the breach on the part of the respondent no.2 is proved then the respondent no.3 is not liable to pay the compensation.

13. Considering the rival contentions and submissions of both the sides, it is necessary to refer to here that admittedly the driver/ respondent no.1 was holding driving licence to drive light motor vehicle (N.T.), that can be seen from the licence placed on record at Exhibit 50. The licence was issued to the respondent

no.1 on 07.09.2007 and it was valid till 06.09.2007. The copy of the insurance policy is placed on record vide Exhibit 52, from which it appears that the type of the vehicle insured is goods carrying commercial vehicle. So the respondent no.1 was not driving the vehicle which the authority has authorised him to drive. However, looking to both the documents, it appears that both the vehicles were light motor vehicles but the difference is only in respect of the transport or non transport vehicle. Therefore, it appears from the entire evidence on record that the breach committed by respondent no.2 is not fundamental breach by which one can say that the respondent no.3 is not at all responsible to pay the compensation even to pay first and then recover. Otherwise, the very purpose of obtaining insurance of the vehicle would be frustrated. Mr. Kakodkar, learned counsel appearing for the appellant/claimant, therefore, has rightly relied upon the observations of the learned Single Judge of this Court in the case of ***Bajaj Allianz General Insurance Co. Ltd., V/s Smt. Sangita w/o Bhagwan Raut & others*** reported in ***2015(1) ALL MR 305*** wherein it is observed at para 13 thus :

“**13.** From the above discussion, it is clear that it is not in every case that the Tribunal must direct the Insurance Company to first pay the compensation amount and then recover it from the

insured, and that it can issue such a direction only when the facts and circumstances of the case before it warrant so. In other words, the Tribunal has jurisdiction to issue direction to the Insurance Company to first pay compensation amount and then recover it from the insured, however, the same has to be exercised only when the facts and circumstances of the case justify it."

14. Looking to the above observations, it appears that the same is applicable to the facts of the present case being identical.

15. Mr. Timble, learned counsel appearing for the respondent no.3 has relied upon the observations in the unreported judgment dated 14.08.2014 passed in ***First Appeal No. 268 of 2008*** in the case of ***National Insurance Co. Ltd., V/s Mr. Devnath M. Yadav and others***. However, I have gone through the observations of the above cited authority and I am of the opinion that the observations in the case of ***Bajaj Allianz General Insurance Co. Ltd.,*** (supra) are more identical to the facts of the present case in view of the fact that the vehicle was insured with respondent no.3 and the fact that the respondent no.1 was driving the vehicle having valid driving licence to drive a

light motor vehicle. In such circumstances, I am of the opinion that the direction can be given to respondent no.3 to pay the compensation to the claimant first and then recover it from the respondent no.2. Hence, the point no.2 is answered accordingly. Therefore, the following order :

O R D E R

- (i) The appeal is partly allowed.
- (ii) The respondent nos. 1 to 3 are liable to pay an amount of Rs.34,733/- to the claimant along with interest of 9% per annum from the date of the filing of claim petition till its realisation.
- (iii) The respondent no.3 is directed to pay the amount of compensation to the claimant first and then recovery it from the respondent no.2.
- (iv) Award is modified accordingly.
- (v) The appeal stands disposed of accordingly.

K. L. WADANE, J

at*