

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 581 OF 2014

New India Assurance Company Ltd.
Aurangabad Through its Divisional Manager,
Adalat Road, Aurangabad.

...APPELLANT
(Ori.Respdt. No. 2)

versus

1. Chhagan s/o Keru Narwade,
Age: Major, occu: Agril.,
R/o: Takali Khatgaon,
Taluka Nagar, District Ahmednagar.
2. Manda Chhagan Narwade,
Age: Major, Occup. Household,
R/o : as above.
3. Pandharinath s/o Popat Ghadge,
Age: Major, Occu. Business,
R/o C/4/3 Shri Ganesh Ches,Ltd.,
Haramb Building Plot No. 28,
Nerula Thane, New Mumbai
(Maharashtra State)

...RESPONDENTS
(Respdt. Nos. 1 & 2 ori.
Claimants, Rspdt No. 3 Ori.
Respdt. No.1)

.....

Mr. S.G. Chapalgaonkar, Advocate for appellant
Mr. Y. V. Kakade, Advocate for Respondents No. 1 and 2
Respondent No. 3 is served through paper publication.

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CORAM : K.K. SONAWANE, J.

RESERVED ON : 21st SEPTEMBER, 2017.

PRONOUNCED ON : 30th NOVEMBER, 2017.

JUDGMENT :-

1. This first appeal is filed under section 173 of the Motor Vehicles Act, 1988 (for short "Act of 1988") against impugned judgment and award dated 23-12-2010 passed by the Member, Motor Accident Claims Tribunal, Ahmednagar (for short "Tribunal"), imposing monetary liability jointly and severally, in the proceedings of Motor Accident

Claim Petition No. 435 of 2006. The appellant – original respondent -Insurance Company preferred the present appeal to redress its grievance.

2. The genesis of the appeal in nutshell is that ill fated deceased Shital - 07 years old girl, was the daughter of respondents No.1 and 2- herein i.e. original claimants. On the fateful day of accident, i.e. on 15-08-2006, deceased Shital had been to the school for attending the function of celebration of independence day. After flag hoisting function, she started returning to home from the school. When she was crossing the Nagar – Kalyan road, the vehicle truck bearing No. MH-04-AL-5199 came speedily from the side of Balvani village and gave dash to minor deceased Shital. The vehicle was driven in a very rash and negligent manner by the driver without paying attention to the pedestrian and traffic condition on the road. The deceased Shital received fatal injuries in the accident. She was escorted to the Government Hospital for medical treatment. But, the concerned Medical Officer of the Civil Hospital declared her dead. The first information report about the mishap came to be filed in the MIDC Police Station, Ahmednagar. The police registered the crime No. I-114 of 2006 under section 304(A), 279 of the Indian Penal Code (for short "IPC") and set the penal law in motion against driver of the offending vehicle. The police personnel visited to the spot of incident and drawn spot panchnama. Investigating Officer also prepared inquest panchnama on the dead body and referred it to autopsy. The medical expert conducted post-mortem and opined that the deceased Shital died due to hemorrhage shock following polytrauma. The parents of

the deceased Shital cast the allegations that driver of the offending vehicle driven the vehicle truck in a very negligent and rash manner. He did not take care of the traffic condition as well as students of the school, crossing the road. The parents blamed the driver of the truck for the accidental death of their daughter - Shital. Therefore, parents preferred the application under section 166 read with section 140 of the Act of 1988 for compensation to the tune of Rs. 3,00,000/- + 50,000/- for the loss caused to them following death of their beloved daughter.

3. The notices of the claim petition were issued to both the respondents - owner and Insurance Company. Despite service of notice, respondent No. 1-owner remained absent nor filed any written statement on record. The circumstances constrained the Tribunal to proceed *ex-parte* against him. However, in response to notice, the appellant - Insurer i.e New India Assurance Company Ltd., caused its appearance and vociferously opposed the allegations for monetary liability following accidental death of deceased Shital. Appellant-Insurance Company filed written statement (Exhibit-11) on record. Appellant - Insurance Company denied about the manner in which the alleged accident occurred, as propounded on behalf of claimant. Respondent - Insurance Company categorically alleged that driver of the offending vehicle was not in possession of effective and valid driving licence at the relevant time to drive the vehicle truck involved in the accident. There was breach of terms and conditions of the insurance policy, therefore, appellant - Insurance company is not liable to indemnify to the insured. The driver was also not made party in the

proceedings, therefore, appellant - Insurance Company prayed to absolve it from monitory liability.

4. In view of rival pleadings on behalf of both sides, the learned Member of the Tribunal framed the requisite issues at (Exhibit-13) for just and proper determination of claim petition. The applicant - Chagan - father of deceased Shital examined himself on oath and also produced relevant documents of police record as well as document pertains to Insurance Policy of the offending vehicle, extract of driving licence etc. on record. Appellant - Insurance Company did not adduce any evidence in refutation. After evaluating the evidence on record, the Tribunal arrived at the conclusion that respondents i.e. owner and the insurer both are jointly and severally liable to pay the compensation to the tune of Rs. 1,59,500/- including compensation awarded under section 140 of the Act of 1988 with interest accrued thereon to the claimants - parents of the deceased Shital. The Tribunal accordingly passed the impugned judgment and award, the validity, and propriety of which is agitated in this appeal.

5. The Appellant - Insurance Company seeks to avoid its liability on the ground that driver did not possess effective and valid licence to drive the "heavy goods vehicle" like the vehicle involved in the accident. Therefore, there was violation of terms and conditions of the policy and no liability can be fastened on the insurer to indemnify loss caused to the insured. There is no dispute about the quantum of compensation determined by the Tribunal.

6. Mr. Chapalgaonkar, learned counsel for the appellant - Insurance Company submits that the Tribunal committed error in rejecting the defence of the insurer the Tribunal ought to have held that the driver of offending vehicle was holding licence to drive "light motor vehicle" and not "heavy goods vehicle" at the time of alleged accident. Therefore, there was breach of condition of insurance policy. He alleged that the Tribunal did not appreciate factual aspect in its proper perspective and erroneously imposed the joint and several liability for payment of compensation. Mr. Chapalgaonkar, learned counsel explained that the document of insurance policy of the offending vehicle, demonstrates the gross weight of the vehicle was 16200 K.G. The alleged offending vehicle was of the category of "heavy goods vehicle" and not a "light motor vehicle". The driver was not authorized to drive heavy goods vehicle but he was permitted to drive light motor vehicle at the relevant time of accident. Therefore, it is manifestly clear that there was breach of conditions of the insurance policy and it is an statutory defence available for insurer to avoid liability under sub-section(2) of section 149 of the Act of 1988. He submits that in view of rule of law, once there is breach of condition of the policy, the liability cannot be fastened on the insurer. He relied upon the decision of **Hon'ble Apex Court in National Insurance Company Ltd. Vs. Challa Bhaviathamma & others (2004) SCC 517, New India Assurance Co. Ltd. Vs. Asha Raony & other (2003) 2 SCC 223.** He has given much more emphasis on the definition clause of the "light motor vehicle" and "heavy goods vehicle" as well as "gross weight of vehicle" as given under section 2 of the Act of 1988. He urged that the findings

expressed by the Tribunal rejecting the defence of the Insurance Company for breach of conditions of the policy, are imperfect, illegal and deserves to be upset.

7. Learned counsel for respondents-original claimants raised objection to the contention propounded on behalf of appellant - Insurance company and submits that appellant - Insurance company did not prove that offending vehicle involved in the accident was of the category of "heavy goods vehicle". There are no documents produced on record to show that offending vehicle was not of a "light motor vehicle". The appellant - Insurance Company did not succeed to establish that insured has not taken care in regard to the use of offending vehicle by allowing the person to drive the vehicle, who was not authorized to drive the same. He placed reliance on the expositions of law laid down in the case of ***National Insurance Company Ltd. Vs. Swarnsingh and others*¹**.

8. Undisputedly, the vehicle insured with the appellant - Insurance Company was the offending vehicle involved in the accident resulting into filing the claim petition for compensation by the parents of deceased Shital. The defence raised by the appellant - Insurance Company, purported to be in terms of section 149(2)(a) of the Act of 1988. It has been alleged that driver of the offending vehicle was not authorized person to drive the same. He was possessing licence for driving the "light motor vehicle", but vehicle involved in the accident was of different class-category and not a "light motor vehicle"

¹ (2004) 3 SCC 297.

category.

9. The Motor Vehicles Act, 1988 is the complete Code enacted to consolidate and amend the law relating to the motor vehicles. The Section 149 relates to the duty of the insurers to satisfy the judgment and award against the person insured in respect of third party risks. The Provisions of section 149(2)(a)(ii) of the Act of 1988 empowers the insurer to defend the liability on the ground that driver was not duly licensed of driving the offending vehicle. The section 149(2) (a) of the Act of 1988 would be reproduced as under:

149: Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.:

(1) XXX XXX XXX XXX XXX XXX XXX

(2) *No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—*

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—

(i) a condition excluding the use of the

vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

*(b) for organised racing and speed testing, or
(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or*

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) xxxxxxxxxx

10. The section (2) of the Act of 1988 contemplates concise meaning of the various expressions used in the Act. Section 2(21) defines "light motor vehicles" and section 2(16) defines the term "heavy goods vehicle", which would read as under :

"2. Definitions : In this Act, unless the context otherwise requires:

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed [7500] kilograms;

(16) "heavy goods vehicle" means any goods

carriage the gross vehicle weight of which, or a tractor or a road-roller the unladen weight of either of which, exceeds 12,000 kilograms;

11. The definition of "light motor vehicle" makes it clear that for a transport vehicle or omnibus the gross vehicle weight of either of which does not exceeds 7500 KG. The term "gross vehicle weight" has been described in section 2(15) as under:

(15) "gross vehicle weight" means in respect of any vehicle the total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle;

12. The provisions of section 2(47) of the Act of 1988 made a reference of "Transport Vehicle" as below:

(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;

13. The Section 3 of the Act of 1988 provides for need to have licence to drive the motor vehicle and special authorization to drive the transport vehicle. Provisions of section 3 mandates that no person shall drive the motor vehicle in any public place unless he holds effective driving licence issued authorizing him to drive the vehicle and no person shall drive such transport vehicle unless his driving licence specifically entitles him so to do.

14. Prior to amendment in 1994, provisions of section 10(2) of the Act of 1988 provides five categories for licences of different class of vehicles i.e. "light motor vehicle" under section 10(2)(d), "medium

goods vehicle" under section 10(2)(e), "medium passenger motor vehicle" under section 10(2)(f), "heavy goods vehicle" under section 10(2)(g) and "heavy passenger motor vehicle" under section 10(2)(h). But, after amendment in 1994 it is evident that expression "transport vehicle" has been incorporated by deleting four categories or class of vehicles referred under sections 10(2)(e) to 10(2)(h) as mentioned supra. However, the provisions to issue licence for "light motor vehicle" under section 10(2)(d) remained as it is and without any amendment.

15. It would be reiterated that, as per section 3 of the Act of 1988, it is incumbent for the person to have authorization so that he could drive "transport vehicle". Moreover, definition clauses discussed above makes it abundant clear that once a licence is issued to drive "light motor vehicle" it would also mean that he has a specific authorization to drive "transport vehicle" or omnibus, the gross weight of which does not exceed 7500 KG. The distinction in category or class of vehicle is made in the Act only on the basis of "gross vehicle weight" or unladen weight of the vehicle. The "heavy goods vehicle" or "heavy passengers vehicle" are the vehicles, the gross vehicle weight or unladen weight of which would be exceeding 1200 K.G.

16. In the matter in hand, the document of certificate of insurance of the offending vehicle (Exhibit-32) was placed on record. It demonstrates that gross vehicle weight of the truck involved in the accident was "16200 KG.". Obviously, the vehicle would be considered as a "heavy goods vehicle" category. It has a gross vehicle weight

exceeds 1200 K.G. In such circumstances, it would be fallacious to appreciate that the vehicle involved in the mishap was of "light motor vehicle" category, having gross vehicle weight was not exceeding 7500 K.G. Apparently, the vehicle involved in the accident was a "transport vehicle" and of a "heavy goods vehicle" category. The driver, who was driving the vehicle at the relevant time of accident, was in possession of licence to drive the transport vehicle of "light motor vehicle" category. It seems that the driver had no authority to drive the heavy goods vehicle, but, he was permitted to drive transport vehicle only of "light motor vehicle" category. Therefore, in view of attending circumstances on record, the inference can be drawn that there was a breach of condition of the insurance policy, as envisaged u/sec. 149(2) (a)(ii) of the Act 1988.

17. As referred supra, section 149(2) of the Act of 1988, enables the insurer to raise defences against the claim of the claimants, in terms of section 149(2) (a)(ii) of the Act 1988. The defence which is available to the insurer is that the vehicle involved in the accident was being driven by the person, who was not authorized to drive the same. Their Lordship of Apex Court in the case of **S. Iyyapan vs. United India Insurance Company Ltd. 2013(6) Mah.L.J. 01** in para no. 10 and 11 observed as under :-

"10. Section 149(2) (a)(ii) gives a right to the insurer to take a defence that person driving the vehicle at the time of accident was not duly licensed. In other words, section 149(2)(a)(ii) puts a condition excluding driving by any person who is not duly licensed. The question arose before this Court as to

whether the Insurance Company can repudiate its liability to pay the compensation in respect of the accident by a vehicle taking a defence that at the relevant time it was being driven by a person having no licence. While considering this point, this Court in the case of Skandia Insurance Co. Ltd. (supra) observed :-

"12. The defence built on the exclusion clause cannot succeed for three reasons, viz.:

(1) On a true interpretation of the relevant clause which interpretation is at peace with the conscience of section 96, the condition excluding driving by a person not duly licensed is not absolute and the promisor is absolved once it is shown that he has done everything in his power to keep, honour and fulfill the promise and the promise and he himself is not guilty of a deliberate breach.

(2) Even if it is treated as an absolute promise, there is substantial compliance therewith upon an express or implied mandate being given to the licensed driver not to allow the vehicle to be left unattended so that it happens to be driven by an unlicensed driver.

(3) The exclusion clause has to be "read down" in order that it is not at war with the "main purpose" of the provisions enacted for the protection of victims of accidents so that the promisor is exculpated when he does everything in his power to keep the promise."

11. To examine the correctness of the aforesaid view, the matter was referred to a 3-Judge Bench because of the stand taken by the Insurance Company that the insurer shall be entitled to defend

the action on the ground that there has been a breach of specified condition of policy i.e. the vehicle should not be driven by a person who is not duly licensed and in that case the Insurance Company cannot be held to be liable to indemnify the owner of the vehicle. The 3-Judge bench of this Court in the case of Sohan Lal Passi vs. P. Sesh Reddy and ors., (1996) 5 SCC 21 after interpreting the provisions of section 96(2)(b)(ii) of the Act corresponding to section 149 of the new Act, observed as under :-

"12.

..... According to us, section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression 'breach' occurring in section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an

infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was willful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under sub-section (1) of section 96...."

18. In view of the aforesaid legal guidelines, there is no impediment to arrive at the conclusion that the appellant - Insurer has a *locus* to raise such statutory defence by availing remedy under section 149(2)(ii) of the Act of 1988. It is fallacious to fasten the liability on the appellant -Insurance company by rejecting the claim of the insurer. The Tribunal committed error to hold that the driver Somnath did possess the effective and valid licence to drive the "heavy goods vehicle" like offending vehicle involved in the accident at the relevant time. The document of insurance policy of the vehicle, contains a clause that the driver must possess effective driving licence at the time of accident and should not be disqualified for such licence. The factual score reflects that the driver was authorised to drive the transport vehicle of "light motor vehicle" category and instead of that, he ventured to drive the "heavy goods vehicle" i.e. offending vehicle. There is no escape but to accept the statutory defence propounded on behalf of appellant - Insurance Company by resorting to section 149(2) of the Act of 1988.

19. The respondent - owner did not secure his presence before the Tribunal even after service of summons. Therefore, adverse inference can be drawn that the insured – owner did not take care to verify the driving licence of the driver before allowing him to drive the offending vehicle. The insured failed to appoint a duly licenced driver. The respondent owner found careless and inattentive while allowing the person who was not holding effective licence to drive such class of vehicle. The driver was required to hold appropriate licence of "heavy goods vehicle" having gross vehicle weight more than 12000 K.G. as per definition clause under Section 2(16) of the Act, 1988. But, it reveals that he did not possess the proper licence and there was breach of the conditions of contract of insurance. The Tribunal was not justified in holding the appellant Insurer liable to indemnify the insured. The learned Member of the Tribunal overlooked or glossed over the serious pitfalls and legal infirmities in the present matter and adopted superficial approach. The category of "light motor vehicle" and "heavy motor vehicle" are distinct and not akin with each other. The circumstances that the policy being operative had no relevance, but the compliance of conditions imposed while issuing the policy at the relevant time to indemnify the insured is significant factor to determine the liability to make good the loss following vehicular accident.

20. The one of the contentions raised on behalf of appellant is regarding non-joinder of driver in the petition before Tribunal. But, this issue was not seriously contested on behalf of appellant - Insurance Company. However, the attending circumstances on record

are sufficient to hold that the driver of the offending vehicle appears not necessary party in this matter and in absence of the driver the Award can be passed. This Court in the case of ***New India Assurance Company Limited Vs. Sitaram Devidayal Jaiswal and others²***, (Coram : Oka A. S., J.) held that if the contention of non-joinder of driver was not agitated before the Tribunal even after it's pleading in written statement, the contentions can not be allowed to be raised in the appeal as same will cause serious prejudice to the claimants.

21. Now, the pivotal issue remained to be considered in regard to recovery of compensation granted to the original claimants. In view of the benevolent object of the Act, it would be proper for the insurer to satisfy the award though the appellant Insurance Company is not liable for the same. The matter pertains to the award of compensation granted in favour of third party. The Hon'ble Apex Court in the case of ***S. Iyyapan*** referred supra in paragraph No. 18, elucidated as follows:

"18. Reading the provisions of Sections 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right's is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely, (i) the vehicle was not driven by a named person, (ii) it was being driven by a person who was not having a duly granted

² 2012(5) Bom.C.R. 285.

licence, and (iii) person driving the vehicle was disqualified to hold and obtain a driving licence. Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy." (Emphasis supplied)

22. In the instant case, the death of deceased Shital was caused due to rash and negligent driving of the offending vehicle. The claimants are the parents of the deceased Shital. The respondent-owner of the offending vehicle remained absent throughout in the proceeding before the Tribunal. It would be unjust and improper to compel the claimant to recover the decretal amount awarded by Tribunal from the owner. It would fallacious to make the parents of deceased Shital to struggle further for recovery of decretal amount. In such circumstances, it would be justifiable to direct the appellant Insurance Company to satisfy the award first and then recover it from respondent - owner of the offending vehicle by initiating proceeding before the Executing Court as if dispute between insurer and owner was the subject-matter of determination before the Tribunal and issue is decided against owner and in favour of insurer.

23. In the above premises, there is no impediment to arrive at the conclusion that, the driver of the offending vehicle did not authorise to drive the heavy goods vehicle involved in the accident. He was holding the driving licence to drive the transport vehicle of "light motor vehicle" category. Therefore, there was breach of insurance contract as contemplated under Section 149(2)(a)(ii) of the Act 1988. The liability to pay compensation cannot be fastened on the appellant Insurance Company. However, as discussed above, the insurer cannot disown the responsibility towards statutory right of a third party i.e. claimant to recover the compensation amount awarded from appellant insurer. Therefore, appeal deserves to be allowed.

24. In view of aforesaid discussion the appeal stands allowed. The impugned judgment and award dated 23-12-2010 passed by the Member, Motor Accident Claims Tribunal, Ahmednagar, in the proceedings of Motor Accident Claim Petition No. 435 of 2006 is hereby upset and modified to the extent that -

- (I) The opponent No.1 owner of the offending vehicle shall pay the amount of Rs.1,59,500/- inclusive of compensation under section 140 of M.V. Act with interest at the rate of 7.5% p.a. from the date of petition till payment to the petitioners, instead of joint and several liability of both opponent Nos. 1 and 2 i.e. owner and insurer.
- (II) The appellant- Insurance Company is hereby absolved from the liability to pay compensation determined by the Tribunal to the claimants. However, the appellant- Insurance Company is

directed to first satisfy the Award by making payment to the claimant and then recover it from the respondent- owner of the offending vehicle by initiating proceedings before the Executing Court.

(III) Rest of the Award is made absolute and confirmed.

25. The appeal stands allowed in above terms and disposed of accordingly.

Sd/-

[K. K. SONAWANE]
JUDGE

MTK.
