IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 543 OF 2011

New India Assurance Co. Ltd.
Aurangabad.
Through its Divisional Manager,
Adalat Road, Aurangabad. **Appellant**.

Versus

1. Vatsalabai wd/o Gorakh Bobade
Age : 40 yrs, occu.: nil.
R/o Tanda, Taluka Paithan,
District Aurangabad.

2. Pandharinath s/o Gorakh Bobade
Age : 17 yrs, oucc.: education
R/o as above.

3. Dwarka d/o Gorakh Bobade
Age : 14 yrs, occu.: education.
R/o as above.

4. Mathura d/o Gorakh Bobade
Age : 13 yrs, occu.: education.
R/o as above.

5. Balu @ Navnath Gorakh Bobade
Age : 12 yrs, occu.: education
R/o as above.

(Respondent Nos.2 to 5 being minor under guardianship of Respondent N.1, mother).

6. Sushilabai w/o Asaram Bobade
Age : 58 yrs, occu.: nil
R/o as above.

7. Asaram Paraji Bobade
Age : 60 yrs, occu.: nil
R/o as above.

8. Subhash Digambar Chabilwad
Age : major, occu.: business,
R/o Gaon Tada, Post Balanagar,
Tal. Paithan, Dist. Aurangabad. **Respondents**.

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Mr. S.G. Chapalgaonkar, Advocate for the appellant.
Mr. V.V. Tarde, Advocate for respondent Nos.1 to 7.
Mrs. S.H. Bali, Advocate for respondent No.8.

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CORAM : SUNIL K.KOTWAL, J.

Judgment reserved on : 23rd October 2018.
Judgment pronounced on : 30th October 2018.

JUDGMENT.

1. This appeal is preferred by New India Assurance Company Limited, Aurangabad against judgment and award passed by Motor Accident Claims Tribunal, Aurangabad (hereinafter referred to as "Tribunal") in Motor Accident Claim Petition No.775/2008, where compensation of Rs. 3,53,400/- was awarded and the liability was saddled on the owner and insurer of the offending vehicle.

2. Respondent Nos.1 to 7 are the original claimant and respondent No.8 is the owner of offending motorcycle bearing registration No. MH-20-AW-1965. .

3. Hereinafter the parties are referred to by their status in the original claim petition.

4. The facts leading to institution of this appeal are that, on 09.02.2008 at about 8.30 p.m. respondent No.1 was driving the offending motorcycle by Aurangabad to Paithan road and that time the deceased Gorakh Asaarm Bobade was the pillion rider on the said motorcycle. Due to rash and negligent driving of the motorcycle by respondent No.1, it dashed against one unknown auto rickshaw resulting into the death of deceased Gorakh, in the Government Hospital. The claimants being widow, children and the parents of deceased, filed claim petition for compensation.

5. Respondent No.1 – owner of the offending motorcycle filed written statement (Exh.19) and admitted occurrence of the accident and involvement of unknown auto rickshaw in the said accident. The contention of respondent No.1 is that the motorcycle was duly insured with respondent No.2 Insurance Company, which is bound to indemnify the owner (respondent No.1).

6. Respondent No.2 – Insurance company filed written statement (Exh.18) and denied its liability, contending that respondent No.1 did not hold valid and effective driving licence on the date and time of the accident, and therefore, on account of breach of condition of policy of insurance, it is not liable to indemnify the owner. Respondent No.2 Insurance Company has also raised objection that the deceased being pillion rider is not covered under the policy of insurance.

7. After considering the oral and documentary evidence on record, the Tribunal awarded compensation of Rs. 3,53,400/- and joint and several liability was saddled on respondent Nos.1 and 2.

8. Heard Mr. S.G. Chapalgaonkar, learned Counsel for the appellant – Insurance Company, Mr. V.V. Tarde, learned Counsel for respondent Nos.1 to 7 (original claimants) and Mrs. S.H. Bali, learned Counsel for respondent No.8 (owner and driver of the offending motorcycle).

9. Learned Counsel for the appellant - Insurance Company fairly concedes that policy of insurance of the offending vehicle being “package policy / comprehensive policy”, inview of

the judgment of the Apex Court in the case of **"Natioinal Insurance Company Ltd. Vs Balakrishnan and anr" (2012 ALL SCR 104)**, even the risk of deceased pillion rider is covered under the policy of insurance. Therefore, the important objection raised by learned Counsel for the Insurance Company regarding the risk of pillion rider on the offending motorcycle, needs no more consideration.

10. The next submission of the learned Counsel for the appellant is that though respondent No.1 – driver/owner of the offending vehicle denied his liability by filing written statement, he has neither given particulars of driving licence to the Insurance Company nor he has filed his driving licence with his written statement. Learned Counsel for the appellant has drawn my attention to Section 134 (c) of the Motor Vehicles Act, 1988, which provides that when any person is injured or any property of a third party is damaged, as a result of an accident in which a motor vehicle is involved, the driver of the vehicle or other person in charge of the vehicle shall give the following information in writing to the insurer, who has issued the certificates of insurance, about the occurrence of the accident, namely :-

(i) insurance policy number and period of its validity;
(ii) date, time and place of accident;
(iii) particulars of the persons injured or killed in the accident;
(iv) name of the driver and the particulars of his driving licence.

11. His next submission is that, by examining one defence witness (DW-1) from the R.T.O. Office, the Insurance Company has duly proved that on the date and time of the accident the driver of offending motorcycle did not hold effective and valid driving licence. Learned Counsel for the Insurance Company has drawn my attention to the case of **"Pappu and others Vs. Vinod Kumar Lamba and another" [(2018) 3 SCC 208]**.

12. The next submission of the learned Counsel for appellant / Insurance Company is that without filing cross objection by the claimants, the claimants cannot claim enhancement of compensation.

13. In reply, learned Counsel for respondent Nos.1 to 7 i.e. the original claimants submits that for breach of condition of policy if the Insurance Company is exonerated, then the Court can pass "pay and recover" order against the Insurance Company. He has drawn my attention towards the judgment of **"Pappu Vs**

Vinod Kumar" (supra) where similar direction was given by the Apex Court against the Insurance Company though the insurer was exonerated from its liability.

14. The next submission of learned Counsel for the original claimants is that while awarding compensation, the Tribunal did not consider the loss of future prospects of the deceased when the deceased was of the age of 42 years at the time of death. He submits that even notional income is not properly considered by the Tribunal and deduction from the annual income of the deceased is improper.

15. Learned Counsel for the owner of the offending motorcycle submits that the Tribunal has rightly held that risk of the pillion rider is covered under the packaged policy of insurance.

16. After going through Section 134 (c) of M.V. Act, it becomes clear that after occurrence of the accident resulting into death of deceased, it was the duty of respondent No.1 to provide information in writing to the appellant/Insurance Company regarding particulars of insurance policy number and period of its validity, date, time and place of the accident, the particulars

of deceased and particulars of his driving licence. However, undisputely respondent No.1, who is driver and owner of offending motorcycle, did not comply the duty as mandated under Section 134 (c) of the M.V. Act. In the case of **"Pappu Vs Vinod Kumar"** (supra), the Apex Court observed that,

> "In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving licence. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle - that the vehicle was not only

> duly insured but also that it was driven by an authorised person having a valid driving licence. Without disclosing the name of the driver in the Written Statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle".

17. Thus, considering the total inaction on the part of respondent No.1, even after the occurrence of accident of the offending motorcycle, certainly I have no hesitation to hold that, through the evidence of employee of R.T.O. Officer (D.W.-1), who has proved that no driving licence was issued to respondent No.1 by R.T.O. Office, Aurangabad and who has proved certificate (Exh.31) to that effect, the appellant Insurance Company has duly proved that on the date and time of occurrence of the accident respondent No.1 – driver of the offending motorcycle did not hold valid and effective driving licence and thereby committed breach of policy of insurance, which mandates that the offending vehicle should be driven only by a person holding effective and valid driving licence. Thus, the appellant – Insurance Company deserves to be absolved from its liability to

indemnify respondent No.1 – owner of the offending motorcycle.

18. However, as observed by the Apex Court in the case of **"Pappu Vs.Vinod Kumar"** (supra), directions needs to be given to the appellant – Insurance Company to pay the compensation amount to claimants in the first instance and later on to recover the same from respondent No.1 – owner of the offending motorcycle, in accordance with law.

19. Though learned Counsel for the appellant – Insurance Company submits that without cross objection quantum of compensation cannot be enhanced, in view of the law laid down in the case of "**"Jitendra Khimshankar Trivedi and others Vs. Kasam Daud Kumbhar and others" [2015 (4) SCC 237]**, the duty is cast on this Court to determine fair and reasonable compensation and even to enhance the compensation in absence of cross objection or cross appeal by the claimant. Therefore, I find no legal impediment to enhance the compensation even in the absence of cross objection, if the claimants can establish that the compensation awarded by the Tribunal is inadequate.

20. While determining the quantum of compensation, age

of deceased plays an important role. Postmortem report (Exh.25) of the dead body of deceased shows that at the time of death the deceased was 42 years old. Therefore, in view of guidelines issued by Apex Court in the case of **"Sarla Varma & Ors Vs. Delhi Transport Corp. & Anr.", (AIR 2009 SC 3104)**, multiplier of "14" is applicable in the case at hand.

21. The claimants claim that the deceased was labourer and he was also earning Rs. 50,000/- per annum from the agricultural land. However, no documentary evidence is placed on record by claimants to prove the income of deceased as an agriculturist or as a labourer. Therefore, I have to determine appropriate notional income of the deceased as able-bodied field labourer. In the case of **"Syed Sadiq Vs. Divisonal Manager, United India Insurance Co. Ltd." (AIR 2014 SC 840)**, the Apex Court assessed notional income of the vegetable vendor as Rs. 6,000/- per month. Therefore, the deceased being field labourer, his notional income cannot be less than Rs. 5,000/- per month. I hold that notional income of the deceased is Rs. 5,000/- per month.

22. In addition to this, in view of the guidelines issued by the Apex Court in the case of **“National Insurance Co. Ltd. Vs. Pranay Sethi and others” [(2017) 16 SCC 680]**, the deceased being in between age of 40 to 50 years, 25% of his actual income is to be added in his monthly income. Therefore, monthly income of the deceased is assessed as Rs. 6,250/-. It follows that the annual income of the deceased is Rs. 75,000/-.

23. Claimants being '7' in number in the family of deceased, as per the verdict of **“Sarla Varma”** (supra), one-fifth income i.e. Rs. 15,000/- is to be deducted from the annual income of the deceased towards his personal expenses. Thus, the contribution of the deceased towards his family is assessed as Rs.60,000/- (75,000 – 15,000). By applying multiplier of “14” to this multiplicand, the loss of dependency is calculated as Rs. 8,40,000/-.

24. In addition to this, as per the guidelines issued by Apex Court in the case of **“Pranay Sethi”** (supra), under conventional heads, claimants are entitled to the following compensation.

Loss of consortium	:-	Rs. 40,000/-
Loss of estate	:-	Rs. 15,000/-
Funeral expenses	:-	Rs. 15,000/-

25. Thus, the claimants are entitled to total compensation under different heads, as under :-

Loss of dependency	:-	Rs. 8,40,000/-
Loss of consortium	:-	Rs. 40,000/-
Loss of estate	:-	Rs. 15,000/-
Funeral expenses	:-	Rs. 15,000/-
Total	:-	Rs. 9,10,000/-

(Rupees Nine Lakh Ten Thousand)

26. The claimants are entitled to interest at the rate of 9% per annum on the above-mentioned compensation amount from the date of filing of the petition till realization of entire compensation amount.

27. As observed above, the appellant – Insurance Company is exonerated from its liability to indemnify original respondent No.1. Therefore, respondent No.1 – owner of offending vehicle is liable to pay the compensation amount to the claimants. However, direction needs to be issued against Insurance Company to pay the compensation to the claimants in the first instance and then to recover the same from owner of the

offending motorcycle i.e. original respondent No.1.

28. Accordingly, First Appeal No.543 of 2011 is allowed.

29. The appellant – Insurance Company is exonerated from its liability to indemnify respondent No.1. Though the appellant is exonerated from its liability to pay the compensation, direction is issued to the appellant – Insurance Company to first pay compensation to the original claimants in accordance with modified award, and thereafter to recover it from original respondent No.1 (owner of offending motorcycle), by initiating proceedings before the Executing Court, as if the dispute between the insurer and owners was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. The Tribunal shall obtain security for the entire amount, which the insurer will pay to the claimants. The Tribunal shall attach the offending vehicle as part of the security. The Tribunal shall obtain security from the owner of offending vehicle of the amount payable to the claimants. If necessity arises, the Tribunal shall take assistance of the Regional Transport Authority concerned.

30. After depositing the compensation in the Tribunal, out of total amount, an amount of Rs. 50,000/- each is to be given to each original claimant Nos.6 and 7 by issuing separate account payee cheques in their names through the Tribunal.

31. The amount awarded to claimant No.7 Asaram Paraji Bobade is to be given to him by issuing separate account payee cheque, through the Tribunal and the amount awarded to claimant No.6 Sushilabai Asaram Bobade is to be kept in fixed deposit in her name in any Nationalized Bank of her choice for a period of one year.

32. The remaining compensation amount shall be equally apportioned amongst claimant Nos.1 to 5.

33. The amount awarded to minor claimant Nos.2 to 5 be invested in fixed deposit in their respective names through claimant No.1 Vatsalabai in any Nationalized Bank of her choice, till minor claimants attain majority. Claimant No.1 is at liberty to receive quarterly interest on this invested amount on behalf of claimant Nos.2 to 5, till they attain majority.

34. The compensation amount of the share of claimant No.1 be paid to her by separate account payee cheque through the

Tribunal.

35. The original respondent No.1 shall pay costs of the claim petition to the claimants.

36. The award be modified accordingly.

37. If the compensation amount is deposited in this Court, it be remitted to the concerned Tribunal, for its payment.

38. Parties to bear their respective costs of the appeal. First Appeal No. 543 of 2011 is disposed of in above-said terms.

(SUNIL K. KOTWAL)
JUDGE

vdd/