

(1)

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

**FIRST APPEAL NO.729 OF 2005
WITH
CIVIL APPLICATION NO. 7937 OF 2004
IN
FIRST APPEAL NO.729 OF 2005**

The Divisional Manager,
United India Insurance Company
Limited, Behind Darling Hotel,
New Osmanpura, Aurangabad.

..APPELLANTS

VERSUS

1. Chaban Hanumant Divekar,
age: 58 years, occ: Nil,
2. Suman Chaban Divekar,
age 50 years, occ: Household,

both residing at Renuka Devi
Galli, At & Post : Paithan,
District Aurangabad;

3. Umesh Ramesh Pardeshi,
age : adult, occup. owner,
resident of Pardeshipura,
Paithan, District Aurangabad. ..RESPONDENTS

Mr D.V. Soman, Advocate for appellant;
Mr Pramod Patni, Advocate for respondent Nos. 1 and
2;

CORAM : SMT. VIBHA V. KANKANWADI, J.

DATE : 27th APRIL, 2018

(2)

ORAL JUDGMENT :

The present appeal has been filed by the Insurance Company-respondent No.3 challenging the judgment and award passed in Motor Accident Claim Petition No. 588 of 1999 by the Motor Accident Claims Tribunal, Aurangabad on 12th February, 2004.

2. Present respondent Nos. 1 and 2 are original claimants. They had contended that deceased Avinash was their son. He along with his friends had gone for regular jogging at about 6.00 a.m. on 17th August, 1999. When they were near Killarikar dispensary at Paithan on Uddhan Jaikwadi Dam road, a tempo trax bearing No. MH-20/A-7904 driven by original respondent No.1 and owned by respondent No.2 came in high speed. The dash was given by tempo trax to Avinash from back side. Avinash as well as his friend Amit Jadhav sustained multiple compound injuries. They both were admitted to Government Medical College Hospital at Aurangabad and then shifted to Kamal Nayan Bajaj Hospital, Aurangabad. However, on the same day,

(3)

Avinash succumbed to his injuries. It was contended that said accident was caused due to rash and negligent driving on the part of driver of tempo trax. The tempo trax was insured with original respondent No. 3 i.e. present appellant. It was also contended that Avinash was 20 years old. He had completed his first year of B.A. and has started Pan Shop near S.T. stand, Paithan. He was getting monthly income of Rs.3000/-.

3. As the matter proceeded, name of respondent No.1 who was said to be driver of the offending vehicle came to be deleted.

4. Respondent No. 2 filed written statement at Exhibit-22 and respondent No. 3 had also filed written statement at Exhibit-26. It was contended by respondent No.2 that he is owner of offending vehicle, however, he denied that respondent No.1 was his driver. One Bhagwan Kishanrao Dhakane, who was holding a valid driving licence, was employed by him as driver on his tempo trax. It was

(4)

contended that Bhagwan Dhakane had parked tempo trax in the night on 16th August, 1998 and handed over the key to respondent No.2. On the next day, at about 7.00 a.m. said Bhagwan Dhakane informed respondent No. 2 that the said vehicle is not at its place of parking. When respondent No. 2 made inquiry with the police, he came to know that respondent No.1 who is a minor, had stolen the vehicle and because of his rash and negligent driving, the accident has been caused. He, therefore, claimed that he is not liable to pay compensation. The insurance company contended that driver of the offending vehicle was not holding valid and effective driving licence on the date of accident and therefore, there is breach of terms of policy conditions. Respondent No.3 prays for exonerating it. The other contents of the claim petition were denied.

5. The issues were framed by the tribunal and then evidence has been led. After considering evidence, the tribunal has come to the conclusion

(5)

that claimants had proved that the accident was caused due to rash and negligent driving on the part of respondent No. 1 and claimants are entitled to get compensation. The petition was partly allowed. It was held that the claimants are entitled to recover the amount of Rs.1,44,500/- inclusive of 'no fault liability' from respondent Nos. 2 and 3 jointly and severally with proportionate costs. Present appellant – original respondent No. 3 is challenging the said award regarding its liability made joint several with respondent No. 2.

6. Heard Mr. Soman, learned Advocate appearing for the appellant and Mr. Patni, learned Advocate appearing for respondent Nos. 1 and 2.

7. It will not be out of place to mention here that the original claimants have not challenged the quantum that has been awarded and therefore, the scope of appeal is restricted to the fact that respondent No. 3 has been made liable

(6)

jointly and severally with respondent No.2.
Therefore, taking into consideration the limited
scope following point arise for my determination.

Whether appellant – respondent No.3 is
liable to pay compensation to the claimants
jointly and severally with respondent No.2?

My finding on the aforementioned point is
in the affirmative for the following reasons.

8. It has been submitted on behalf of the
appellant that the offending vehicle was driven by
a minor driver, who was initially made as
respondent No.1 in the claim petition, however, he
has been deleted later on. When the vehicle was
driven by a minor, then definitely there was no
question that he would be holding driving licence
to drive a particular vehicle. Since the driver
was not holding any licence, the insurance company
cannot be made liable to pay compensation.

(7)

9. Per contra, it has been argued on behalf of the original claimants that the insurance company had every opportunity to prove the fact that driver of the offending vehicle had no valid and effective driving licence at the time of accident, however, no such evidence has been led. It was also pointed out that in the written statement filed by respondent No.3, it was simply stated that the driver was not holding valid and effective driving licence. Specific plea has not been taken regarding minority of respondent No.1 on the date of accident. Even if any breach of condition of policy is there, yet insurance company cannot disown its liability, at the most, the order of 'pay and recover' can be claimed.

10. I find much substance in the argument submitted on behalf of the claimants, present respondent Nos. 1 and 2. At the outset, specific contention has not been raised by the insurance company in its written statement that respondent No.1 was minor when the accident had taken place.

(8)

It is to be noted that written statement of respondent No.2 was read and recorded by the tribunal on 12th March, 2001, whereas written statement of insurance company has been taken on record on 8th August, 2003. That means, much after written statement of respondent No. 2 was taken on record, insurance company has filed its written statement, yet specific plea has not been taken.

11. The claimants had examined the father of the deceased. No doubt, he was not present at the time of accident. Respondent No.2 was absent when his turn to cross examine CW-1 Chaban Divekar. He has been cross examined by respondent No.3 insurance company. Except suggestion that the driver of the tempo trax was minor, there is nothing that has been brought. The witness has claimed ignorance about the same. The claimants' claim was supported by certified copies of police papers. Exhibit-29 is the first information report lodged by one Sachin Salunke, who was friend of deceased. If we peruse the contents of the first

(9)

information report, it is to be noted that driver was boy, however, no reference has been made about his age.

12. There is absolutely no evidence that has been led by the insurance company in order to prove its defence. Every opportunity was available to the insurance company to lead evidence. Further, even respondent No. 2 has not led any evidence in order to support the contents of his written statement, when he intended to say that respondent No. 1 (though he has been deleted later) had taken offending vehicle without his consent and he would not have any control over respondent No.1. Insurance company could have called the investigating officer, who had investigated the case or even summoned respondent No.1 in order to bring his birth date on record. Thus, when though the opportunity was available to lead evidence, said opportunity has not been taken by the insurance company. Now, the appellant cannot claim exoneration on such point, which required specific

evidence.

13. Under such circumstances, the age of respondent No.1 on the date of accident has not come on record and therefore, even the order of 'pay and recover' cannot be passed in this case. In ***Jawahar Singh vs Bala Jain and others***, reported in ***(2011) 6 Supreme Court Cases 425***, it has been observed by the Apex Court that :

“ We cannot shut our eyes to the fact that it was Jatin, who came from behind on the motorcycle and hit the scooter of the deceased from behind. The responsibility in causing the accident was, therefore, found to be solely that of Jatin. However, since Jatin was a minor and it was the responsibility of the petitioner to ensure that his motorcycle was not misused and that too by a minor who had no licence to drive the same, the Motor Accidents Claims Tribunal quite rightly saddled the liability for payment of compensation on the petitioner and, accordingly, directed the Insurance Company to pay the awarded amount to the awardees and, thereafter to recover

(11)

the same from the petitioner. The said question has been duly considered by the Tribunal and was correctly decided. The High Court rightly chose not to interfere with the same.

Without going into the merits of the case, we are of the view that the story of Jatin, who was a minor, walking into the house of the petitioner and taking the keys of the motorcycle without any intimation to the petitioner, appears to be highly improbable and far-fetched. It is difficult to accept the defence of the petitioner that the keys of the motorcycle were taken by Jatin without his knowledge."

14. The facts are somewhat similar here. The evidence has not been led by respondent No. 2 to show that respondent No. 1 had stolen vehicle from his possession and at the cost of repetition, when the age of respondent No.1 on the date of accident, has not been brought on record, even order of 'pay and recover' cannot be passed in this case.

(12)

15. Again at the cost of repetition, I would say that since quantum that has been awarded to the claimants is not challenged, I do not find any illegality or irregularity committed by the tribunal in partly allowing the petition. There is no merit in the present appeal. Hence, present appeal is dismissed.

16. Present respondent Nos. 1 and 2 are allowed to withdraw the amount, if any, lying in this Court.

17. In view of dismissal of the first appeal, nothing survives in the civil application, same stands dismissed.

(SMT. VIBHA V. KANKANWADI, J.)

Tupe