IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2197 OF 2013

Bajaj Allianz General Insurance Co.Ltd.
Through it's Branch Manager,
2nd Floor, Rajendra Chamber,
Adalat Road, Aurangabad. ...Appellant
(Orig. Resp. No.2)

Versus

1) Sundrabai @ Girja W/o. Kashinath Dhole,
Age : 43 years, Occu : Nil,

2) Chandrao S/o. Kashinath Dhole,
Age : 22 years, Occu : Education,

3) Balaji S/o. Kashinath Dhole,
Age : 15 years, Occu :Education,
U/G. Of No.1 Sundrabai

All R/o. Walkewadi, Tq. Himayatnagar,
District Nanded ...Respondents
(Respdt Nos.1 to 3 - Org. Claimants
Respdt No. 4 – Org. Respdt No.1)

Shri. S.G. Chapalgaonkar, Advocate for appellant
Shri. H.I. Pathan, Advocate for Respondent No. 3

CORAM : A.M. DHAVALE, J.

DATE : 8th AUGUST, 2018

JUDGMENT :

1. This is an Appeal by the Insurance Company in

M.A.C.P. No.397/2010 (Old 140/2010). The learned Member, Motor Accident Claims Tribunal at Bhokar, Dist. Nanded by Judgment dated 03.07.2013 awarded compensation of Rs.14,73,600/- with interest @ 10% per annum. Both the owner and insurance company were held jointly and severally liable to pay the amount. Hence, this Appeal.

2. The deceased Kashinath, was husband of claimant No.1 and father of two sons, claimant Nos. 2 and 3, one major and one minor. On 14.01.2010, he was returning from Himayat Nagar to Dudhad by Auto Rickshaw No. MH-26-G 5614. The driver of the Auto Rickshaw drove it rashly and negligently, and when it came near Khadki Pati, it turtled down resulting into grievous injury to Kashinath. He was admitted at Adhar Hospital at Nanded, and was indoor patient up to 22.01.2010. In spite of best efforts and incurring medical expenses of Rs.2,50,000/-, he died on 22.01.2010. The Rickshaw was owned and driven by respondent No.1. The deceased was aged 45 years and serving as a cook in Government Secondary and Higher Secondary Ashram School at Dudhad drawing salary of Rs.15,000/- per month. Respondent No.1 filed written

statement and contested the claim denying rashness and negligence and other contents of the claim petition. He denied that the deceased was passenger in his Auto Rickshaw. Respondent No.2 admitted that the vehicle was insured at the relevant time, but denied the contents of the petition.

3. The learned trial Judge held that the rashness and negligence was proved. There was no breach of Policy. Respondent No.1 was holding valid and effective driving licence. Respondent No.1 was not holding permanent driving licence. He obtained it 8 days after the accident. The deceased was aged 45 years and was getting Rs. 14,647/-. The learned Member deducted 1/3rd amount towards personal expenses and awarded Rs. 12,88,980/- for loss of income, Rs. 1,19,638/- for medical expenses, Rs.50,000/- for loss of consortium and Rs.15,000/- for loss of estate. The learned Member held that the Insurance Company was not liable but it was directed to pay and recover the same from respondent No.1.

4. The learned advocate Shri. Chapalgaonkar for the

appellant-insurance company submitted that the appellant is not challenging quantum of compensation but only the order of the learned Member directing the insurance company to pay and recover the amount. He argued that there was fundamental breach of policy. Respondent No.1 was not holding valid and effective driving licence and valid permit, and therefore, there was no liability on the Insurance Company to indemnify the owner.

5. The points for my consideration and my findings are as follows :-

1.	Whether the order of pay and recover can be treated as decree and appeal-able by the Insurance Company ?	In the affirmative.
2.	Whether the direction for pay and recover passed by the learned Member is illegal ?	In the affirmative.
3.	What order ?	The appeal is dismissed.

REASONS

6. Though, the learned trial Judge has held the insurance

company not liable, he has directed the insurance company to pay the amount and recover the same from the respondent No.1. It is practical knowledge that it is a many times, not possible for the insurance company to recover the amount from the owner of the vehicle. In view of the order passed, the insurance company is aggrieved person and it must be held that insurance company has right to file appeal.

7. The record shows that deceased Kashinath was a passenger in the Auto Rickshaw of respondent No.1. R.C. Book at Exh.51 shows that it was a passenger carrying vehicle of 1+3 capacity in the name of respondent No.1. The FIR and spot panchanama shows that accident took place on 14.01.2010 at 4.15 p.m. The Policy was from 19.12.2009 to 18.12.2010. The learned Member has observed that respondent No.2 had examined Investigating Officer, who had admitted that respondent No.1 was not holding driving licence and on that count, he was prosecuted besides under S. 304A, 279, 337 I.P.C. under section 3/181 and 39/177 of the Motor Vehicle Act and was knowing that he was not holding driving licence still drove

the Rickshaw. It is clear breach of policy and the learned Member rightly held that respondent No.2 was not liable to pay the compensation. Respondent No.2 has also examined Regional Transport Officer, Nanded. He stated that driving licence was issued to respondent No.1 on 22.01.2010, and it was valid for the period of three years. It was a temporary driving licence and the Rules mandate that person holding learner's licence should drive the Rickshaw only when trained licence driver is along with him and plate “L” is displayed on the Rickshaw on front and back. It is thus, clear that respondent No.1 was not holding valid driving licence on the date of accident i.e. 14.01.2010. The policy of insurers Exh.78 provides that any person including the insurer can drive the vehicle provided the person driving holds valid and effective driving licence at the time of accident and is not disqualified for holding and obtaining effective driving licence. It is further provided that the person holding effective learners licence may also drive the vehicle when not used for the transport of the passenger at the time of accident and that such a person satisfy the requirement Rule 3 of Central Vehicles Rules 1989. Though respondent No.1 has not produced documentary evidence except driving licence, it is certain that he was not entitled to carry passengers while driving Rickshaw with the learner's driving licence, and he was supposed to have a trained driver holding valid licence by his side while driving with learner's licence."

8. In **National Insurance Co. Ltd. Vs. Swarn Singh and Ors. (2004) 3 SCC 297,** it was held that a person holding learner's licence would, also thus, come within the purview of “duly licenced” as such a licence is also granted in terms of the provisions of the Act and the Rules framed thereunder. It cannot, therefore, be said that when a vehicle is being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not “duly licenced” resulting in conferring a right on the insurer to avoid the claim of third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exist a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provisions by a person having a learner's licence, the insurance companies would be liable to satisfy

the decree.

9. **National Insurance Co. Ltd. Vs. Parvathneni & another 2009 8 SCC 785,** it was a case where cheque for renewal of premium was issued, but it was dishonored. The High Court passed the order of pay and recover from the owner as the insurance company had proved that it has no liability to make such payment.

10. In **National Insurance Co. Ltd. Vs. Challa Bharathamma AIR 2004 SC 4882,** the Tribunal held that owner was not having required permit, but still held that insurance company was liable. The High Court of Bombay has also held that insurance company was liable. After considering the legal position, the Apex Court held that a person without permit to ply a vehicle cannot be placed at a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of section 149 (2), defence is available to the insurer on that aspect. The Apex Court further observed, the residual question is what would be the appropriate

direction. considering the beneficial object of the act, it would be proper for the insurer to satisfy the award though in law it has no liability. In some cases, insurance company has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from owner, the insurer shall not be required to file the suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.

11. The learned advocate Shri. Chapalgaonkar conceded that in case of breach of policy in the form of not holding the valid driving licence, the orders of pay and recover are regularly passed, even though insurance company is not liable.

12. I find that there was valid insurance of the vehicle and driving of the vehicle by the owner when he was not holding valid driving licence or was holding learner's licence in a breach of policy not so fundamental as to completely

disregard the beneficial object of protecting interest of the third party who are not concerned with the breach of policy. In these circumstances, the learned trial Judge has rightly relied on judgments in **(i) National Insurance Co. Ltd. Vs. Swarna Singh**[1]**; (ii) Oriental Insurance Co. Ltd. Vs. Rakesh Kumar & Ors.**[2]**; (iii) National Insurance Co. Ltd. Vs. Hansraj Ram & Ors.**[3]; **(iv) United India Insurance Co. Ltd. Vs. Maryanush Kujure & Ors.**[4]**,** wherein it has been held that in such cases, the order for pay and recover can be passed. I, therefore, find that the learned trial Judge has not committed any error in passing the order of pay and recover.

13. Hence, the appeal is devoid of merits, it deserves to be dismissed and is accordingly dismissed. There shall be no order as to costs.

(**A.M.DHAVALE, J**)

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1 AIR 2004 SC 1531
2 2012 AAC 2123 (Del)
3 2012 AAC 2038 (ALL)
4 2012 AAC 1313 (CHH)