

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

FIRST APPEAL NO.523 OF 2016

Pawan s/o Gulchand Musale,
Age : 30 Occu: Business,
R/o Gandhora, Tal. Tuljapur,
Dist: Osmanabad.

APPELLANT
(Orig.
... Rspdnt No.1)

VERSUS

1. Laxmibai w/o Biru Sontakke,
Age - 50 years, Occu: Labour,
R/o Gandhora, Tq. Tuljapur,
District Osmanabad.
2. Biru s/o Pandurang Sontakke
(died) LR's are already on
record.
3. Chandrakant s/o Biru Sontakke,
Age: 23 Occu
R/o Gandhora, Tq. Tuljapur,
District Osmanabad.
4. The Manager,
ICICI Lombard General Insurance
Co. Ltd., ICICI Bank Towers,
Badra - Kurala Complex, Mumbai -
400 051.
5. The Oriental Insurance Co. Ltd.,
through Branch Manager,
26/138 SBI Building, Near S.T.
Stand, Osmanabad Dist.Osmanabad. ...

Respondents
Org.Rspndnts

WITH

FIRST APPEAL NO.1350 OF 2016

1. Laxmibai w/o Biru Sontakke,
Age - 50 years, Occu: Labour,
R/o Gandhora, Tq. Tuljapur,
District Osmanabad.
- Biru s/o Pandurang Sontakke
(died) LR's are already on
record.

2. Chandrakant s/o Biru Sontakke,
Age: 23 Occu
R/o Gandhora, Tq. Tuljapur,
District Osmanabad. ... **APPELLANT**
(Orig. Claimant)

VERSUS

1. Pawan s/o Gulchand Musale,
Age : Major Occu: Business,
R/o Gandhora, Tal. Tuljapur,
Dist: Osmanabad.
2. The Manager,
ICICI Lombard General Insurance
Co. Ltd., ICICI Bank Towers,
Badra – Kurla Complex, Mumbai –
400 051.
3. The Oriental Insurance Co. Ltd.,
through Branch Manager,
26/138 SBI Building, Near S.T.
Stand, Osmanabad Dist.Osmanabad. **Respondents**
(Org.Rspndnts)

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Mr. S.B. Choudhari, for the Appellant.
Mr. Manoj Shinde, for respondent Nos.1 and 3.
Mr. A.G. Choudhari, for Respondent No.4.
Mr. U.S. Malte, for Respondent No.5.

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CORAM : SUNIL K. KOTWAL, J.

Reserved on : 03rd April, 2019

Pronounced on : 16th April, 2019

JUDGMENT:

1. These appeals are filed against the one and the same award passed by the Motor Accident Claims Tribunal, Osmanabad; in M.A.C.P. No.54/2007, whereas, compensation of Rs.4,00,000/- was awarded and liability

was fastened against original opponent No. 1 – owner of the offending vehicle.

2. Opponent Nos. 2 and 3, two insurers of the offending vehicle were exonerated. First Appeal No. 523/2016 is filed by original opponent No. 1 i.e. owner of the offending vehicle and First Appeal No.1350/2016 is filed by the original claimants for enhancement of the compensation. In First Appeal No.1350/2016, respondent No.1 is original opponent No.1 i.e. owner of the offending vehicle and respondent Nos. 2 and 3 both are insurers of the offending vehicle. Hereinafter, parties are referred in accordance with their status in the original proceeding as claimants, owner of the offending vehicle and insurers of the offending vehicle.

3. The facts leading to institution of these counter appeals are that ten days prior to the accident, respondent No.1 purchased offending Auto Rickshaw. On 26.12.2006, respondent No. 1 and deceased Suryakant @ Rajendra were proceeding to R.T.O. Osmanabad for obtaining registration of this newly purchased auto rickshaw. Respondent No. 1 – owner was driving the auto rickshaw while proceeding towards R.T.O. Osmanabad by Naldurg to Tuljapur State Highway.

Due to rash and negligent driving of the auto-rickshaw by respondent No. 1, on the spot of accident he lost control on the rickshaw and it turned turtle on the road; resulting into serious injuries to the deceased Suryakant @ Rajendra who was traveling by the same auto-rickshaw as its passenger. The deceased was shifted to hospital Tuljapur but he was declared dead. Therefore, the dependents of the deceased filed claim petition before Motor Accident Claims Tribunal, Osmanabad.

4. By filing written statement Exh.22, respondent No. 2 one of the insurer of the auto-rickshaw; denied the claim in toto and contended that deceased himself was driving the auto-rickshaw and while talking on mobile phone as one Jeep when came from opposite direction, then deceased lost the control, resulting into the above said accident. It was also contended that at the time of accident the opponent No. 1 did not hold valid and effective driving license and the cheque issued by opponent No. 1 towards payment of premium for the insurance policy bounced and therefore, the policy of insurance stood automatically canceled.

5. By filing written statement (Exh. 46), second insurer of offending rickshaw contended that till the

date of occurrence of the accident the rickshaw was not duly registered by concern R.T.O. and therefore, by plying such unregistered vehicle by public road, the respondent No. 1 committed breach of condition of policy of the insurance. This insurer also took the defence that on the date of accident opponent No.1 did not hold valid and effective driving license to drive the auto-rickshaw.

6. After considering the evidence placed on record by both the parties, the Tribunal held that on the date of accident, the offending rickshaw was duly insured with opponent Nos. 2 and 3. The Tribunal also held that the insurers failed to prove that the opponent No. 1 committed breach of condition of policy by not holding valid and effective driving license. However, tribunal also held that due to plying of auto-rickshaw without registration and permit, the owner of offending vehicle committed breach of condition of the policy. In the result, both insurers of the offending vehicle were exonerated and liability to pay compensation of Rs.4,00,000/- was fastened against only opponent No. 1 who is the owner of the offending rickshaw.

7. Heard Mr. S.B. Choudhari learned counsel for

appellant owner of the offending rickshaw, in First Appeal No.523/2016. Mr. Manoj Shinde learned counsel for original claimants, Mr. A.G. Choudhari and Mr. U.S. malte for two insurers of the offending rickshaw.

8. This is second round of litigation. Once the matter is remanded by this Court in First Appeal No. 480/2010 to give opportunity to the Opponent No. 1 to prove his driving license and accordingly after remand and after recording additional evidence, the Tribunal held that on the date and time of the occurrence of the accident opponent No.1; who was the owner and driver of the offending rickshaw; held valid and effective driving license to drive the auto-rickshaw. Against that finding, no cross-objection is filed by both the insurance companies and therefore, this point has reached to finality and cannot reopened. Even the finding given by Tribunal that on the date of accident the offending auto-rickshaw was insured with opponent Nos. 2 and 3 is not challenged by both the insurance companies and therefore, this finding also reached to finality and is not open for reconsideration. Even the death of deceased Suryakant @ Rajendra Sontakke on 26.12.2006 in motor vehicle accident in which the offending rickshaw was involved is not challenged by

owner of the rickshaw or both insurers and it is not open for reconsideration.

9. Before the tribunal issues are framed at Exh.29 and additional issues are framed at Exh.47. Though issue No. 1 at Exh.29 is framed "whether the accident dated 24.12.2006 by offending rickshaw occurred due to rash and negligent driving by driver of auto-rickshaw?", it was not decided by the tribunal. However, as sufficient material is available, on record, to determine this issue, instead of remanding the matter, this issue is decided in the appeal at hand.

10. Learned counsel for insurers submit that at the time of accident the opponent No.1 owner/driver allowed the deceased to share the driving seat with him and the accident occurred only because the deceased suddenly turned the handle of rickshaw to bring the rickshaw on road when one Jeep came from opposite direction. Contention of learned counsel for insurer is that the accident occurred due to rash and negligent act of deceased himself.

11. However, this contention of learned counsel for insurers is not acceptable for the simple reason that the opponent No. 1 is the only person who can say

and depose regarding the exact manner in which the accident occurred.

12. It is to be noted that neither in written statement nor in the deposition, opponent No. 1 Pawan Musale whispered a word regarding occurrence of accident due to the sudden turning of handle of the rickshaw by the deceased. On the other hand, from the cross-examination of Pawan DW-1, it has been brought on record that at the time of accident; deceased was occupying the passenger seat of the rickshaw. Another important aspect is that to prove the rash and negligent act of the deceased, on behalf of both insurance companies, no witness is examined and no evidence is brought on record. Therefore, when the sole eye witness Pawan DW-1 has not corroborated the contents of FIR, it cannot be held that the accident occurred due to the rash and negligent act of the deceased.

13. On the other hand, from the evidence of opponent No. 1 (DW1) it emerges that at the time of accident, he was driving the rickshaw. Even Laxmibai PW-1 has categorically deposed before the Court that at the time of accident opponent No. 1 was driving the rickshaw in rash and negligent manner. The occurrence

of the accident due to turning up the rickshaw, itself shows that the accident occurred due to rash and negligent driving of the rickshaw by opponent No.1. Accordingly, I answer above issue and point in affirmative.

14. While passing the judgment, tribunal held that on the date of accident, the offending rickshaw was insured with both opponent Nos. 2 and 3 - insurance companies. Regarding this point issue No. 3 is answered in affirmative by the tribunal. Against that finding, no cross-objection is filed by both the insurance companies. Therefore, this point is not open for reconsideration. It is to be held that on the date of accident the offending rickshaw was duly insured with opponent Nos. 2 and 3 - insurance companies.

15. Learned counsel for owner of the offending rickshaw submits that only because the rickshaw was not registered with R.T.O. Office and only because permit, for plying rickshaw on road; was not obtained by owner of the rickshaw, it cannot be held that the owner has committed breach of condition of policy of the insurance. To substantiate his contention, he placed reliance on judgment of Kerala High Court in **Joby Thomas Vs. Annamma Augustine.**, reported in (2014 (2)

ALL MR (Journal) 13 (Kerala High Court)). He also placed reliance on **Oriental Insurance Company Limited Vs. Ashok Ramvilasji Vyas & Ors.**, reported in **(2004 (4) ALL MR 100)** wherein, this Court held that when Matador registered for carrying passenger met with the accident, simply because claimant paid the fare to the driver of Matador along with other passenger, it cannot be said that there was breach of terms and condition of insurance policy, because it is not case where passenger was driving any goods vehicle.

16. At the out set, I must say that the case Oriental Insurance Company Vs. Ashok Vyas is certainly distinguishable on facts as well as due to distinct *ratio decidendi*. Even the judgment of Kerla High Court is not good law because Apex Court in **National Insurance Company Limited Vs. Challa Upendra Rao and other.**, reported in **[(2004) 8 SCC 517]**, after considering **New India Assurance Company Limited Vs. Asha Rani.**, reported in **[(2003) 2 SCC 223]** and **National Insurance Company Limited Vs. Nicolletta Rohtagi.**, reported in **[(2002) 7 SCC 456]**, held that a person without permit to ply a vehicle cannot be placed on a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle

without permit is an infraction. Therefore, in terms of Section 149 (2) a defence is available to the insurer on that aspect. These authorities are also considered by this Court **Bajaj Alliance General Insurance Company Limited Vs. Annasaheb Ramdas Shedale and Ors.**, reported in [2016 (6) ALL MR 634], while holding that plying Ape rickshaw on road without valid permit amounts to breach of policy of insurance. The above legal principle was reiterated by Apex Court in **Narinder Singh Vs. New India Assurance Company Limited and others.**, reported in [2014 (9) SCC 324] and Punjab and Haryana High Court in **M.S. Middle High School and Anr Vs. Usha and others** in its judgment dated September 26th, 2017 in (**First Appeal No.7555 of 2015**). The ratio of **National Insurance Company Limited Vs. Ashalata Bhowmik and others.**, decided by Apex Court on August 31st, 2018 in (**Civil Appeal No.9100 of 2018**) is distinguishable on facts for the reasons that the deceased was neither owner nor driver of the offending rickshaw.

17. In view of this legal position, the contention of learned counsels for both insurers, is acceptable that because respondent No. 1 has admitted in his cross-examination that on the date of accident, his

rickshaw was not registered and permit was not obtained by him to ply the rickshaw on road, the opponent No.1 had committed breach of condition of policy of the insurance. Otherwise also section 39 of Motor Vehicle Act mandates that no person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered in accordance with this Chapter and the certificate of the registration of the vehicle has not been suspended or canceled and the vehicle carried a registration mark displayed in the prescribed manner. Section 66 of Motor Vehicle Act also prohibits the use of motor vehicle on public road without permit.

18. Undisputedly, on the date of accident, the offending auto-rickshaw was not registered and no permit was obtained by the opponent No.1. Therefore, by plying such unregistered auto-rickshaw without obtaining permit from concern R.T.O. office, amounts to total violation of mandatory provisions of Section 39 and Section 66 of Motor Vehicle Act and in view of law laid down by Apex Court and this Court in above cited authorities, it amounts to breach of condition of policy of the insurance. Thus, I have no hesitation to

hold that the opponent No.1 has committed breach of condition of policy of the insurance and therefore, legally no liability can be fastened against the opponent Nos. 2 and 3 - Insurance Companies to pay the compensation to the claimants.

19. However, as contended by learned counsel for claimants, in National Insurance Company Limited Vs. Challa Upendra Rao (supra) Apex Court also observed in para 13 of the judgment that :

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 the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before executing Court concerned 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. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the Regional Transport Authority concerned. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to

direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case, considering the quantum involved, we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured.

20. Thus, though opponent Nos. 2 and 3 deserve to be exonerated from its liability, to pay the compensation, directions need to be issued to them first to pay the compensation amount to the claimants and later on recovered it from the opponent No.1 - owner of the offending vehicle.

21. Now, question arises what would be the just and reasonable compensation payable to the claimants because in First Appeal No.1350/2016, the claimants have claimed enhancement of the compensation. Learned counsel for the claimants submits that though deceased was 22 years old bachelor, mason by occupation, the tribunal did not consider the loss of future prospect. Even the tribunal did not apply proper multiplier of 18 while determining the loss of dependency. It has been also pointed out by learned counsel for claimants that the Tribunal did not award compensation under conventional head. He placed reliance on **Sarla Varma and Ors. Vs. Delhi Transport Corp. and Anr.**, reported

in [AIR 2009 SC 3104] and **National Insurance Co. Ltd. Vs. Pranay Sethi and Ors.**, reported in [2018 (3) Mh. L. J. (SC) 70].

22. While determining the compensation, the tribunal held that the monthly income of the deceased was Rs.6000/- per month. This income is not disputed by opponent Nos.1 to 3 in previous round of litigation. Even in this appeal, the learned counsels for owner of the offending vehicle and insurers of the vehicle cannot point out that the income of 22 years old young boy can be less than Rs.6000/- per month. Otherwise also, the deceased being mason by occupation, his notional income needs to be considered as Rs.6000/- per month. It follows that his annual income comes to Rs.72,000/-. As deceased was below the age of 40 years, in view of law settled by Apex Court in Pranay Sethi (supra) 40% amount is to be added in the annual income of the deceased, towards loss of future prospects. Thus, total annual income of deceased comes to Rs.1,00,800/- .

23. As deceased was bachelor, half amount is to be deducted towards his personal expenses. Thus, the income of the deceased available to the claimants comes to Rs.50,400/- As the age of the deceased was 22

years, multiplier of 18 is applicable. Thus, loss of dependency comes to Rs.9,07,200/-.

24. In addition to this, as per verdict of Apex Court in Pranay Sethi (supra), the claimants are entitled to following compensation under conventional head :

- a) Loss of Estate : Rs.15000/-
- b) Funeral Expenses : Rs.15000/-

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

Loss of dependency	:	Rs.9,07,200/-
Loss of Estate	:	Rs.15000/-
Funeral Expenses	:	Rs.15000/-

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Total : Rs. 9,37,200/-

26. Claimants are also entitled to interest on this compensation amount @ 9% per annum from the date of filing of petition till realization. This compensation shall be inclusive of no fault liability compensation.

27. In view of this discussion, First Appeal No.1350/2016 filed by claimants deserves to be partly allowed and First Appeal No.523/2016 filed by owner of the offending vehicle deserves to be dismissed.

28. Accordingly, First Appeal No.1350/2016 is partly allowed and First Appeal No.523/2016 is dismissed.

29. The award passed by Motor Accident Claims Tribunal, Osmanabad in M.A.C.P. No.54/2007 is modified as under :

"i) Claim petition is allowed with proportionate cost;

ii) Opponent No.1 do pay total compensation of Rs.9,37,200/- to the claimant Nos. 1 and 3 with interest there on @ 9% per annum from the date of filing of the petition till realization. This compensation shall be inclusive of no fault liability compensation;

iii) Opponent Nos. 2 and 3 are exonerated. However, opponent Nos. 2 and 3 are directed to jointly and severally pay the compensation of Rs.9,37,200/- to the claimant Nos. 1 and 3 and later on recover it from the opponent No.1 owner of the offending vehicle;

iv) For the purpose of recovery of the amount from the opponent No. 1 – owner, the opponent Nos. 2 and 3 shall not be required to file suit and it may initiate a proceeding before

the executing court concerned as if the dispute between the insurer and owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurers. Before release of the amount to the claimants, the owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending rickshaw shall be attached, as a part of the security. If necessity arises the tribunal shall take assistance of the Regional Transport Authority concerned. The executing Court shall pass appropriate orders in accordance with law as to the manner in which owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. insured.

- v) Deficit court fees, if any, be recovered from the claimants. Award be drawn accordingly."

30. Parties to bear their respective costs of the appeals. Appeals are dispose of in above said terms.

(SUNIL K. KOTWAL, J.)

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