IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.34 OF 2018

The New India Assurance Co. Ltd.
Through Its Branch Manager,
Branch At Shivaji Cross Road,
Shrirampur Dist. Ahmednagar.
Through Its Authorised Signatory,
Administrative Officer,
Aurangabad D.O. Legal Hub,
Aurangabad. ...Appellant.

VERSUS

1. Rashid s/o Mohiddin Tamboli,
Age 48 years, Occupation Hotel
Business, R/o Saval Songaon
Tq. Rahuri Dist. Ahmednagar.
At Present Nevasa Road,
Shrirampur Tq. Shrirampur
Dist. Ahmednagar.

2. Ganpat s/o Vishvanath Bhosale,
Age 47 years, Occupation
Business, R/o Loni Tq. Rahuri
Dist. Ahmednagar. ...Respondents.

....

Advocate for Appellant : Mr. D. P. Deshpande.
Advocate for Respondent No.1 : Mr. Sk. Mazhar A. Jahagirdar.

...

CORAM : SMT.VIBHA KANKANWADI, J.

Date of Reserving The Order : 03-07-2019.

Date Of Pronouncing The Order : 05-08-2019.

ORDER :

1. Present appeal has been filed by the Insurance company challenging the Judgment and award passed by learned Motor Accident Claims Tribunal, Shrirampur Dist. Ahmednagar in Motor Accident Claim Petition No.102 of 2014, dated 16-09-2016, on the ground of fastening liability to pay compensation on the Insurance Company first and to recover it from present respondent No.2.

2. Present respondent No.1 is the original claimant who had filed said Motor Accident Claim Petition under Section 166 of the Motor Vehicles Act for getting compensation. He was 45 years age hotelier, earning Rs.20,000/- to Rs.25,000/- per month at the time of accident. He was proceeding on motorcycle on 20-04-2014, when jeep bearing No.MH-17/AJ-3683 gave dash to him after coming from opposite direction. The said accident had taken place due to the negligence on the part of the driver of said jeep. The jeep was owned by respondent No.1 and insured with respondent No.2 on the date of the accident. Claimant suffered serious injuries. He has taken treatment, however his accidental injuries have turned into permanent physical disability for him. It is stated that, he is unable to do any work as before. He had claimed compensation of Rs.12,00,000/-.

3. Matter proceeded ex-parte against respondent No.1.

4. Respondent No.2 Insurance Company denied all the averments in the petition and took statutory defence that, the driver of the jeep was not holding valid and effective driving licence, and therefore, there is breach of terms of policy. The Insurance Company claimed exoneration from payment of compensation amount.

5. Claimant examined himself and adduced evidence by examining doctor who certified the disability certificate and an eye-witness. The learned Tribunal has come to the conclusion that, the accident took place due to the negligence on the part of jeep driver. The claimant has suffered permanent physical disability. It was further held that, Insurance Company has proved that, there is breach of terms of policy as the driver was not holding valid and effective driving licence on the date of accident. In order to establish the same, the Insurance Company had examined concerned Clerk from Road Transport Office, Shrirampur. Compensation of Rs.8,06,530/- has been awarded together with interest, however the Insurance Company has been directed to pay the amount of compensation to the claimant and then to recover it from respondent No.1.

6. Heard learned advocate Mr. Dhananjay Deshpande for appellant and learned advocate Mr. Shaikh Mazhar A. Jahagirdar for respondent No.1 original claimant. Respondent No.2 though served,

remained absent.

7. It has been vehemently submitted on behalf of the appellant that, the learned Tribunal failed to consider that, when the statutory defence under Section 149 of the Motor Vehicles Act has been proved by the Insurance Company, then order regarding pay and recover cannot be issued to the Insurance Company. The concerned officer from Road Transport Office had stated that, driver Ravindra Tukaram Dengale was holding transport licence form 18-09-2006 to 17-09-2009. He renewed it on 04-08-2014. That means, on the date of the accident i.e. 20-04-2014, he had no valid driving licence to drive LMV Non-Transport Vehicle. Therefore, when there was no licence at all on the date of the accident, the order of pay and recover ought not to have been passed by learned Tribunal. He, therefore, prayed for setting aside the award and exonerating the Insurance Company from payment of compensation.

8. Per contra, learned advocate appearing for the respondent No.1 submitted that, the claimant was a third party, and therefore, the Insurance Company cannot avoid liability to pay. He relied on the decision in, *S. Iyyapan Vs. United India Insurance Company Ltd. and Ors.*, reported in *2013 ACJ 1944*, wherein after relying on the various decisions including *National Insurance Company Ltd. Vs. Swaran Sing and Ors., (2004) 3 SCC 297*, it has been held that,

"18. Reading the provisions of Section 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right 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 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."

9. As aforesaid, the Insurance Company has not challenged the other findings including the quantum. The only narrow question that is involved is, "As to whether the Tribunal was justified in passing an order of 'pay and recover' ?". Here admittedly the claimant is a 'third party', and therefore, under the said circumstance whether

Insurance Company could have avoided its liability under Section 149 of Motor Vehicles Act, is a question. What has come on record that, the driver of the jeep was having driving licence for transport category between 18-09-2006 to 17-09-2009, but then he got the driving licence renewed on 04-08-2014. The accident took place on 20-04-2014, that means after the accident, the said driving licence has been got renewed. In case of *National Insurance Company Ltd. Vs. Swaran Sing and Ors. (Supra)*, this situation has been noted. The Hon'ble Supreme Court has observed as follows ;

> *"Thus, a person whose licence is ordinarily renewed in terms of the Motor Vechiles Act and the rules framed thereunder despite the fact that during the interregnum period, namely, when the accident took place and the date of expiry of the licence, he did not have a valid licence, he could during the prescribed period apply for renewal thereof and could obtain the same automatically without undergoing any further test or without having been declared unqualified therefor. Proviso appended to Section 14 in unequivocal term states that the licence remains valid for a period of thirty days from the day of its expiry. ."*

10. Further the decision in, *Sohan Lal Passi Vs. P. Sesh Reddy and Ors.*, reported in *(1996) 5 SCC 21 : (1996) ACJ 1004 (SC)* was considered wherein it was held that, "the Insurance Company cannot get rid of its liability to pay compensation only by saying that, at the relevant point of time the vehicle was driven by a person having no

licence". For the sake of convenience, the conclusion that was drawn in case of *Swaran Sing and Ors. (Supra)*, is reproduced here ;

> *"47. If a person has been given a licence for a particular type of vehicle as specified therein, he cannot be said to have no licence for driving another type of vehicle which is of the same category but of different type. As for example, when a person is granted a licence for driving a light motor vehicle, he can drive either a car or a jeep and it is not necessary that he must have driving licence both for car and jeep separately.*
>
> *48. Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down under Section 149 (2) (a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. By reason of the provisions contained in the 1988 Act, a more extensive remedy has been conferred upon those who have obtained judgment against the user of a vehicle and after a certificate of insurance is delivered in terms of Section 147 (3). After a third party has obtained a judgment against any person insured by the policy in respect of a liability required to be covered by Section 145, the same must be satisfied by the insurer, notwithstanding that the insurer may be entitled to avoid or to cancel the policy or may in fact have done so. The same obligation applies in respect of a judgment against a person not insured by the policy in respect of such a liability, but who would have been covered if the policy had covered the liability of all persons, except that in respect of liability for death or bodily injury.*

xxx xxx xxx

73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

xxx xxx xxx

110. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149 (2) (a) (ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the

insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149 (2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) *The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.*

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has

satisfactorily proved its defence in accordance with the provisions of Section 149 (2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub- section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

As per (vi) above what the Insurance Company was required to prove was that the breach of the condition was so fundamental as it found to have contributed to the cause of accident. Here in this case, the driving licence was renewed on 04-08-2014. The gap may be more, but then it was not brought on record by the Insurance Company that driver was required to undergo any separate test. Further the cross-examination of the witness examined by the Insurance Company shows that, he has admitted that, since the driver was not disqualified, his licence has been renewed. Therefore, definitely taking into consideration the catena of Judgments of the Hon'ble Apex Court cited above and also the decision in, *ICICI Lombard General Insurance Company, Nagpur Vs. Mathurabai Devendra Wankhede and others*, reported in *2016 (4) Mh.L.J. 104*, relied by the learned Tribunal, it can be said that the order of pay and recover was not at all illegal. No interference is required in the said order. There is no merit in the present appeal, appeal deserves to be dismissed. Hence, accordingly appeal is dismissed with costs.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.